had "sullied" the reputation "of the university and its faculty." *Id.*

In late October and again in early November 2000, Dean Carter placed telephone calls to the company that printed the *Innovator* "on behalf of the [University] administration and ordered [it] not to print the Innovator without prior approval of the newspaper's content by a [University] administrator." App. 37a; *see also* App. 2a, 27a. Although the owner of the printing company expressly admonished Dean Carter that such an order was "probably unconstitutional," she insisted that he "call her personally before printing the next issue of the newspaper and reminded him that [the University] paid" the *Innovator*'s printing bill. App. 37a.

Upon learning of Dean Carter's demand, Petitioners refused to submit the *Innovator* to the University administration for its review and approval prior to publication. App. 2a. For its part, the printing company was unwilling to publish future issues that had not been approved as Dean Carter had required because it "was not willing to take the risk that it would not be paid." App. 2a. As a result, publication of the *Innovator* ceased in November 2000. App. 2a-3a.

2. Proceedings Below

In January 2001, Petitioners filed this civil action in the United States District Court for the Northern District of Illinois seeking declaratory and injunctive relief and damages pursuant to 42 U.S.C. § 1983. *See* App. 49a. Petitioners alleged that the University, its trustees, Dean Carter and other administrators had violated their First and Fourteenth Amendment rights by, *inter alia*, imposing an unconstitutional system of prior restraint on the newspaper's publication. App. 49a. In April 2001, the district court granted the University's motion to dismiss the complaint on

the ground that, as a state agency, it was immune from suit by operation of the Eleventh Amendment. App. 52a.

The remaining defendants ultimately moved for summary judgment on various grounds. In November 2001, the district court granted summary judgment to each of the remaining defendants, with the exception of Dean Carter. App. 48a. With respect to her, the district court held that there was "a disputed issue of material fact as to whether Dean Carter's asserted conduct violated plaintiffs' clearly established First Amendment rights" so as to preclude summary judgment. App. 47a. Relying on, *inter alia*, the Fourth Circuit's decision in *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973), the district court concluded that Dean Carter "was not constitutionally permitted to take adverse action against the newspaper because of its content." App. 47a.

In so holding, the district court rejected Dean Carter's contention that this Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), permitted University officials to insist upon prior approval of the *Innovator*'s content as a condition precedent to its dissemination on campus. App. 47a. The district court also rejected Dean Carter's related argument that this Court's decision in *Hazelwood* could reasonably be construed as "cast[ing] doubt" on the scope of First Amendment protection afforded to student journalists in the university context such that, even if Dean Carter had imposed a system of prior restraint in violation of the First Amendment, she was nonetheless entitled to qualified immunity because the unconstitutionality of her conduct was not "clearly established" at the time. App. 47a. According to the district court, *Hazelwood* was inapplicable because it involved "a high school newspaper that was part of a journalism class. . . . Here, however, all editorial decisions were made by

student editors and the Innovator was not part of a class, but an autonomous student organization." App. 47a.

Dean Carter thereafter pursued an interlocutory appeal. App. 26a. Framing the question before it as "whether the principles of *Hazelwood* apply to public college and university students" so as to excuse Dean Carter's conduct, a three-judge panel of the Seventh Circuit affirmed the district court's decision. App. 26a.[3] "While *Hazelwood* teaches that younger students in a high school setting must endure First Amendment restrictions," the panel concluded, "we see nothing in that case that should be interpreted to change the general view favoring broad First Amendment rights for students at the university level." App. 32a. The panel observed that:

> [f]or several decades, courts have consistently held that student media at public colleges and universities are entitled to strong First Amendment protections. . . . Attempts by school officials, like Dean Carter here, to censor or control constitutionally protected expression in student-edited media have consistently been viewed as suspect under the First Amendment.

App. 28a (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (*en banc*)).

Dean Carter petitioned the Court of Appeals for rehearing *en banc*. *See* App. 59a. The full Court of Appeals granted the petition, vacated the panel's decision and, in an opinion by Judge Easterbrook on behalf of seven of that court's eleven judges, held that "*Hazelwood*'s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools." App. 7a. In so holding,

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[3] Petitioners appeared *pro se* in the Court of Appeals.

the Court of Appeals majority concluded that "there is no sharp difference between high school and college papers" with respect to the pedagogical need for administrators to "ensure 'high standards for the student speech that is disseminated under [the school's] auspices'" or to "dissociat[e] the school from 'any position other than neutrality on matters of political controversy,'" App. 6a (citing *Hazelwood*, 484 U.S. at 271, 272) (first alteration in original), even when the student speech at issue takes place separate and apart from the educational curriculum.

The majority of the *en banc* court further reasoned that university students such as Petitioners, all of whom had reached the age of majority, are not entitled to any greater rights under the First Amendment than the high school students before this Court in *Hazelwood*. *See* App. 6a. ("[M]any high school seniors are older than some college freshmen, and junior colleges are similar to many high schools."). By the same token, the majority determined that the *Innovator*'s status as a student-run extracurricular activity divorced from any academic classroom program did not entitle it to any greater First Amendment protection against prior restraints than the publication at issue in *Hazelwood*, which had been produced by a high school journalism class as part of the educational curriculum. *See* App. 13a (rejecting contention that "only speech that is part of the [educational] curriculum is subject to" restriction).

Finally, the Court of Appeals majority held that, even if the *Innovator* constituted a "public forum" within which the University could not constitutionally "'censor speech,'" App. 12a (citation omitted), Dean Carter was nevertheless entitled to qualified immunity because the resolution of that issue was sufficiently "cloudy" that her conduct could not be said to violate Petitioners' "'clearly established'" rights. App. 11a, 13a (citation omitted). According to the court:

> Disputes about both law and fact make it inappropriate to say that any reasonable person in Dean Carter's position in November 2000 had to know that the demand for review before the University would pay the *Innovator*'s printing bill violated the first amendment.

App. 14a-15a.

Four judges dissented and joined in a single opinion by Judge Evans. App. 15a. In their view, the majority had improperly extended the holding of *Hazelwood* to a university setting and, in so doing, had "applie[d] limitations on speech that the Supreme Court created for use in the *narrow* circumstances of elementary and secondary education." App. 15a. The dissenting judges rejected the majority's conclusion that anything in this Court's decision in *Hazelwood* either altered the pre-existing constitutional law that governed Dean Carter's conduct or rendered that law sufficiently "cloudy" to entitle her to qualified immunity:

> The *Innovator*, as opposed to writing merely about football games, actually chose to publish hard-hitting stories. And these articles were critical of the school administration. In response, rather than applauding the young journalists, the University decided to prohibit publication unless a school official reviewed the paper's content before it was printed. Few restrictions on speech seem to run more afoul of basic First Amendment values.

App. 20a.

REASONS FOR GRANTING THE WRIT

More than thirty years ago, this Court held that officials at a public university must operate within the confines of the First and Fourteenth Amendments and are precluded, as are all public officials who act "as the instrumentality of the State," from infringing the fundamental rights of college and university students to freedom of speech and of the press. *Healy v. James*, 408 U.S. 169, 187-88 (1972). Since then, both this Court and the courts of appeals have consistently re-affirmed this well-settled law. *See, e.g.*, *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973) (university's expulsion of student for disseminating student newspaper it deemed indecent violated First and Fourteenth Amendments); *Joyner v. Whiting*, 477 F.2d 456, 462 (4th Cir. 1973) (university may not withdraw support for student newspaper because it disagrees with views expressed therein); *Bazaar v. Fortune*, 476 F.2d 570, 572, 580 (5th Cir. 1973) (university may not prevent publication and distribution of student publication on grounds that it contained language that was "inappropriate" or "in bad taste").

In this case, however, the Seventh Circuit embraced the contention of a university official that this Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), altered this well-established constitutional calculus and excused her decision to impose a system of prior restraint on the publication of a student-operated newspaper produced by and for adult students outside the University's educational curriculum. That decision conflicts with *Healy* and its progeny in this Court as well as with the holdings of several courts of appeals that the First and Fourteenth Amendments preclude university officials from censoring student newspapers in this manner. Moreover, the Seventh Circuit's

decision has exacerbated the recent palpable confusion in the lower courts concerning the reach of this Court's holding in *Hazelwood* in a manner that threatens to restrict substantially the freedom of expression on college and university campuses throughout the nation.

I. THE DECISION BELOW CONFLICTS WITH *HEALY v. JAMES* AND ITS PROGENY

In *Healy v. James*, 408 U.S. at 187-88, this Court held that a public university, "acting . . . as the instrumentality of the State," is obliged to respect the First and Fourteenth Amendment rights of the students who attend such institutions. Rejecting the contention of a college president that he could deny recognition to a campus chapter of a controversial political group, the Court held that the president's decision, which rested on his assessment of the views that the group espoused, "was a form of prior restraint" forbidden by the First Amendment. *Id.* at 184. In so holding, the Court emphasized that it was applying "well-established First Amendment principles." *Id.* at 170. All nine justices joined in the Court's judgment and eight of them joined in Justice Powell's opinion, which explained that:

> [T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The college classroom with its surrounding environs is peculiarly the "marketplace of ideas," and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.

Id. at 180-81 (citations omitted).

The following term, in *Papish v. Board of Curators*, 410 U.S. at 667, the Court extended the First Amendment rights articulated in *Healy* to student-operated newspapers published on college campuses. In *Papish*, a university student challenged her expulsion from school for distributing a newspaper that administrators deemed "indecent." *Id.* at 668. Holding that the expulsion violated the First and Fourteenth Amendments, this Court explained in a *per curiam* opinion that "the mere dissemination of ideas – no matter how offensive to good taste – on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Id.* at 670 (citation omitted). The Court reiterated its admonition to university officials in *Healy* that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech." *Id.* at 671.

In the more than three decades following *Healy* and *Papish*, this Court has never deviated from this view of the First Amendment's proper application in the college and university setting. Thus, in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Court held that the First Amendment precludes university administrators from denying funding to student-operated publications, produced as extracurricular activities, based on the views expressed in those publications. In *Rosenberger*, a group of students at the University of Virginia published a newspaper, *Wide Awake*, which espoused Christian views. *Id.* at 825-26. The University had established a student activities fund into which all students paid a mandatory fee. *See id.* at 824-25. Pursuant to certain guidelines, the student council was then authorized to disburse monies from the fund to student organizations, including organizations disseminating student publications. *See id.* When the

students who published *Wide Awake* sought permission to tap the student activities fund to reimburse a printer for the cost of producing their newspaper, the student council and, subsequently, the university's dean of students, denied their request because the newspaper promoted a particular religious viewpoint in violation of university guidelines. *Id.* at 827. This Court concluded that, "[h]aving offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints." *Id.* at 835. As the Court explained:

> Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.

Id. at 835 (citing, *inter alia*, *Healy*, 408 U.S. at 180-81).

The Seventh Circuit's decision in this case cannot be reconciled with *Healy* and its progeny.[4] The court's opinion

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[4] In this regard, it cannot reasonably be disputed that Dean Carter's conduct – *i.e.*, her imposition, in the wake of the newspaper's published criticism of the University's administration, of a requirement that she review and approve each issue of the *Innovator* prior to its publication – constitutes "the most serious and the least tolerable infringement on First Amendment rights" known to our law. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) ("[T]he danger of censorship and of abridgment of our precious First Amendment freedoms is too great where

fails to address or even cite either *Healy* or *Papish* and references *Rosenberger* only in passing. App. 6a, 11a. Instead, the Court of Appeals relies entirely on this Court's decision in *Hazelwood* and expressly "hold[s]" that "*Hazelwood*'s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools." App. 7a. As a result, the Seventh Circuit accepted Dean Carter's contention that *Hazelwood* excused her decision to impose a system of prior restraint on the publication of a student-operated newspaper at a public university because it had previously published articles critical of the university's administration and the decisions it had made.

Indeed, the Seventh Circuit's reliance on *Hazelwood* came at the invitation of Dean Carter, who invoked that decision both to justify her conduct as constitutionally permissible and to support her contention that, even if she had violated the Petitioners' First Amendment rights, those rights were not "clearly established" at the time she acted. *See* App. 47a. Nothing this Court held or wrote in *Hazelwood*, however, detracts from its holdings in *Healy* and *Papish* or even arguably operates to excuse the otherwise unconstitutional conduct in which Dean Carter engaged in this case for three fundamental reasons.

First, the Court in *Hazelwood* addressed only the constitutional limitations imposed by the First and Fourteenth Amendments in public high schools, not in the college or university setting before the Court in *Healy*, *Papish* and *Rosenberger*. Thus, while the Court emphasized in *Healy*

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officials have unbridled discretion over a forum's use"); *Lovell v. Griffin*, 303 U.S. 444, 451 (1938) (ordinance requiring license to distribute written materials of any kind within city limits "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship").

that First Amendment protections apply with no "less force on college campuses than in the community at large," 408 U.S. at 180, in *Hazelwood*, the Court retrenched from that view not at all, but rather reached the distinct conclusion that educators *in the secondary school context* "must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics." 484 U.S. at 272. As a result, the Court held in *Hazelwood* only that *high school educators* "do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.[5]

The distinction that this Court has drawn between the First Amendment rights enjoyed by high school students, on the one hand, and university students, on the other, flows from the fact that the vast majority of high school students are minors, while virtually all college and university students are adults.[6] In no small part because, "during the formative

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[5] That said, while the First Amendment may permit high school administrators to impose some restrictions on certain expressive activities, secondary school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). In *Tinker*, for example, this Court held that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible," even in a public high school. *Id.* at 511.

[6] Only one percent of those enrolled in American colleges or universities are under the age of 18, while 55 percent are 22 years of age or older. App. 31a. *See Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) ("[u]niversity students are, of course, young adults" and "are less impressionable than younger students"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 429-30 (1992) (Stevens, J., concurring in judgment) ("the

years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," *Bellotti v. Baird*, 443 U.S. 622, 635 (1979), secondary school educators have very different roles and responsibilities than their college and university counterparts. Thus, while the university campus is intended to be a caldron of "'speculation, experiment and creation,'" *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (citation omitted), "[t]he role and purpose of the American public school system" is, in contrast, to "'inculcate the habits and manners of civility as values in themselves . . . and as indispensable to the practice of self-government in the community and the nation,'" *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (citation omitted).

Second, the Court's decisions in *Healy* and its progeny all involved expressive activity that, though subsidized or authorized in some manner by a public university, was not undertaken as part of the educational curriculum. *See Healy*, 408 U.S. at 176 (use of campus meeting rooms and bulletin boards by extracurricular student group that espoused controversial views); *Papish*, 410 U.S. at 667 (distribution of student newspaper on campus with university permission); *Rosenberger*, 515 U.S. at 826-27 (student activity fee subsidy

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distinctive character of a university environment, or a secondary school environment, influences our First Amendment analysis") (citations omitted); *Thompson v. Oklahoma*, 487 U.S. 815, 853 (1988) (O'Connor, J., concurring in judgment) ("[l]egislatures recognize the relative immaturity of adolescents, and we have often permitted them to define age-based classes that take account of this qualitative difference between juveniles and adults"); *Bd. of Regents of the Univ. of Wis. Sys.*, 529 U.S. at 238 n.4 (Souter, J., concurring in judgment) (this Court's "cases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools, whose students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education") (citations omitted).

for student-produced publication espousing religious views).[7] In *Hazelwood*, in contrast, the newspaper at issue was written and edited by students in the context of a high school journalism class. 484 U.S. at 262-63. The journalism class "was taught by a faculty member during regular class hours. Students received grades and academic credit for their performance in the course" and the teacher "'was the final authority with respect to almost every aspect of the production and publication of [the newspaper], including its content.'" *Id.* at 268 (citation omitted).

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[7] As this case illustrates, those college and university newspapers published separate and apart from the educational curriculum as an *extra-curricular* activity are, even when funded by student activity fees, operated as limited public fora in which the educational institutions themselves, both formally and through historical practice, have relinquished any right to act as a traditional "publisher" and control the newspaper's editorial content. *See, e.g.*, Mark J. Fiore, *Trampling The "Marketplace of Ideas": The Case Against Extending Hazelwood To College Campuses*, 150 U. Pa. L. Rev. 1915, 1962 (2002) ("most college publications are under the primary control of students, with little or no oversight from college officials"). This is hardly surprising since, except in those instances in which a newspaper is produced as part of a journalism curriculum, its very purpose is to afford students the opportunity to act as *journalists* and the university community the ability to receive news and information about the university uncensored by the institution itself. Accordingly, the Seventh Circuit's conclusion that an official in Dean Carter's position could reasonably be surprised to learn that a student newspaper such as the *Innovator* constituted a limited public forum immune from University interference with its editorial content is refuted both by the *Innovator*'s undisputed status as a student activity operated apart from the educational curriculum and the undisputed record in this case. *See, e.g.*, Dep. of S. Fagan, at 59:4-8 (University President acknowledges that no administrator, including the newspaper's adviser, "has a right to approve [the *Innovator*'s content] in the sense of preventing the newspaper from being printed").

Emphasizing these facts, this Court in *Hazelwood* concluded that the high school newspaper at issue in that case was a curricular activity, "a supervised learning experience for journalism students." *Id.* at 270. For that reason as well, the Court concluded that high school administrators "were entitled to regulate the contents of [the newspaper] in any reasonable manner." *Id.* Indeed, in *Hazelwood*, the Court explicitly stated that the only question it confronted in that case was "the extent to which educators may exercise editorial control over the contents of a *high school newspaper produced as a part of the school's journalism curriculum*" and it expressly disclaimed any intention of deciding "whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." *Id.* at 262, 273 n.7 (emphasis added).

Third, although the Seventh Circuit purports to rest its decision on the power invested in school officials to regulate student expression by this Court's decision in *Hazelwood*, as Dean Carter had urged, *see* App. 3a (asserting that *Hazelwood* "holds that faculty may supervise and determine the content of a student newspaper"), in the end, it did no such thing. Rather, following its express holding that "*Hazelwood*'s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools," App. 7a, the Court of Appeals proceeded to conclude, as it was obliged to do given the procedural posture of the case and the record evidence, *see* note 1 *supra*, that – as an extracurricular activity operated separate and apart from the University's educational curriculum – the *Innovator* constituted a "public forum" and Dean Carter was therefore constitutionally prohibited from subjecting it to a system of prior restraint, *see* App. 10a (conceding that reasonable trier of fact could conclude that "the *Innovator* operated in a public forum and thus was beyond the control

of the University's administration"). In the wake of this necessary concession, there is simply no principled basis on which to distinguish this case from *Healy*, *Papish* or *Rosenberger* or to conclude that this Court's decision in *Hazelwood* somehow excused Dean Carter's actions in violation of the law on this subject "clearly established" in *Healy* and its progeny.

In the last analysis, therefore, the Seventh Circuit's decision in this case cannot be reconciled with *Healy* or with the litany of subsequent cases in which this Court has held that the First and Fourteenth Amendments protect students at public colleges and universities from official interference with the exercise of their rights of free expression when undertaken separate and apart from the educational curriculum itself.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL APPELLATE COURTS

For the same reasons discussed *supra*, the Seventh Circuit's decision conflicts with the holdings of the several courts of appeals that have faithfully applied this Court's decisions in *Healy* and its progeny for the last three decades. As Judge Evans noted in his dissenting opinion below, "[p]rior to *Hazelwood*, courts were consistently clear that university administrators could not require prior review of student media or otherwise censor student newspapers. *Hazelwood* did not change this well-established rule." App. 21a (citations omitted).

Thus, for example, in *Joyner v. Whiting*, 477 F.2d at 460, the Fourth Circuit held unconstitutional the decision of a university president to withdraw financial support from the school's official student newspaper in the wake of its publication of a controversial editorial. The Fourth Circuit explained that:

> It may well be that a college need not establish a campus newspaper, or, if a paper has been established, the college may permanently discontinue publication for reasons wholly unrelated to the First Amendment. But if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment.

Id. *See also id.* ("Censorship of constitutionally protected expression cannot be imposed [at a college or university] by suspending the editors [of student newspapers], suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censorial oversight based on the institution's power of the purse.").

Similarly, in *Bazaar v. Fortune*, 476 F.2d 570, 574 (5th Cir. 1973),[8] the Fifth Circuit held that officials at the University of Mississippi violated its students' First Amendment rights when they prohibited the publication of a student literary magazine. In so ruling, the court reiterated the "well-established rule that once a University recognizes a student activity which has elements of free expression, it can act to censor that expression only if it acts consistent with First Amendment constitutional guarantees." *Id.* at 574. *See also, e.g.*, *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (*en banc*) (holding that university officials violated First Amendment by confiscating student yearbooks); *Student Gov't Ass'n v. Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (*Hazelwood* "is not applicable to college newspapers"); *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983) ("A public university may not constitutionally

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[8] The opinion was affirmed *en banc* with minor modification. *Bazaar v. Fortune*, 489 F.2d 225 (5th Cir. 1973).

take adverse action against a student newspaper, such as withdrawing or reducing the paper's funding, because it disapproves of the content of the paper"); *Schiff v. Williams*, 519 F.2d 257, 260-61 (5th Cir. 1975) (university's firing of student editors because of university's objections to the newspaper's "poor grammar, spelling and language expression" violated First Amendment).[9]

The panel below was, therefore, certainly correct when it noted that, "[f]or several decades, courts have consistently held that student media at public colleges and universities are entitled to strong First Amendment protections" and that "school administrators can only censor student media if they show that the speech in question is legally unprotected or if they can demonstrate that some significant and imminent physical disruption of the campus will result from the publication's content." App. 28a. The Seventh Circuit's decision in this case, in contrast, stands in direct conflict with this body of precedent.

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[9] *Cf. Sinn v. The Daily Nebraskan*, 829 F.2d 662, 663 (8th Cir. 1987) ("where student publications of state-supported universities are concerned, editorial freedom of expression has consistently triumphed over attempts at censorship"). The lower federal courts are in accord. *See, e.g., Am. Civil Liberties Union of Va., Inc. v. Radford College*, 315 F. Supp. 893, 896-97 (W.D. Va. 1970) ("[A] state university [may not] support a campus newspaper and then try to restrict arbitrarily what it may publish, even if only to require that material be submitted to a faculty board to determine whether it complies with 'responsible freedom of press.'"); *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970) ("[I]n cases concerning school-supported publications . . . the courts have refused to recognize as permissible any regulations infringing free speech when not shown to be necessarily related to the maintenance of order and discipline within the educational process").

III. THE DECISION BELOW COMPOUNDS THE CONFUSION IN THE LOWER COURTS FOLLOWING *HAZELWOOD v. KUHLMEIR* AND BROADLY THREATENS FREE EXPRESSION AT PUBLIC COLLEGES AND UNIVERSITIES

Following *Hazelwood*, the courts of appeals have struggled mightily to assess its impact in a variety of contexts. These cases have spawned a host of conflicting analyses, multiple dissenting opinions in individual cases, and *en banc* rehearing in two circuits, including the Seventh Circuit's decision in this case. At this juncture, therefore, this Court's further guidance is both appropriate and necessary.

In *Kincaid v. Gibson*, 236 F.3d 342, 345 (6th Cir. 2001), for example, the Sixth Circuit, sitting *en banc*, assessed the constitutionality of Kentucky State University's decision to confiscate and withhold distribution of its student yearbook because university officials determined that it was "of poor quality and 'inappropriate.'" *Id.* A divided panel of that court affirmed the district court's determination that, under *Hazelwood*, the propriety of the university officials' conduct turned on whether such conduct was "reasonable." *Id.* at 346 (citing *Hazelwood*). The full court, however, granted *en banc* review "to determine whether the panel and the district court erred in applying *Hazelwood* – a case that deals exclusively with the First Amendment rights of students in a high school setting – to the university setting." *Id.* Ultimately, the Sixth Circuit concluded that the university's conduct in confiscating the yearbook was unconstitutional because it was neither a reasonable time, place or manner regulation nor a "narrowly crafted regulation designed to preserve a compelling state interest." *Id.* at 354. In so holding, the Sixth Circuit explained:

> The parties essentially agree that *Hazelwood* applies only marginally to this case. [The students] argue that *Hazelwood* is factually inapposite to the case at hand; the KSU officials argue that the district court relied upon *Hazelwood* only for guidance in applying forum analysis to student publications. Because we find that a forum analysis requires that the yearbook be analyzed as a limited public forum – rather than a nonpublic forum – we agree with the parties that *Hazelwood* has little application to this case.

Id. at 346 n.5. Thus, the *en banc* court rejected the panel's decision that, under *Hazelwood*, the propriety of withholding the yearbook turned on whether such conduct was "reasonable." *See id.* at 347 (analyzing whether university's conduct was constitutional as either a time, place or manner regulation or a regulation narrowly crafted to serve a compelling state interest).

Similarly, in *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002), a panel of the Ninth Circuit divided sharply over the application of this Court's decision in *Hazelwood* to a student's claim that the University of California at Santa Barbara ("UCSB") violated his First Amendment rights by refusing to approve his graduate thesis and file it in the school library. The district court granted summary judgment in favor of the defendants. *Id.* at 946. Announcing the panel's decision affirming that judgment, Judge Graber observed that "courts addressing the extent to which a public college or university, consistent with the First Amendment, can regulate student speech in the context of *extracurricular* activities, such as yearbooks and newspapers, have held that *Hazelwood* deference does not apply." *Id.* at 949 (citing *Kincaid*, 236 F.3d at 346 & nn. 4 & 5; *Student Gov't Ass'n*, 868 F.2d at 480 n.6). By the same token, Judge Graber

concluded that, where "core *curricular* speech" is at issue, *id.* at 950, "*Hazelwood* articulates the standard for reviewing a university's assessment of a student's academic work," *id.* at 949.[10] According university officials the deference contemplated by *Hazelwood*, Judge Graber determined that UCSB did not violate the student's First Amendment rights when it decided not to approve the thesis. *Id.*

Concurring in the affirmance, Judge Ferguson concluded that the case did not implicate the First Amendment at all because, in his view, the university sought to punish the plaintiff for his lack of academic integrity, not for the content of his speech. *Id.* at 956. Accordingly, Judge Ferguson concluded that, "[j]ust as the university could punish the plaintiff for plagiarism or cheating, so could it refuse to approve his dishonest" conduct in connection with the preparation of his thesis. *Id.*

Judge Reinhardt dissented in part, emphasizing that "there is no agreement between my colleagues in the

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[10] *Accord Bishop v. Aranov*, 926 F.2d 1066, 1074 (11th Cir. 1991) (holding that, under *Hazelwood*, a university may attempt to control a professor's speech during classroom instruction because "educators do not offend the First Amendment by exercising editorial control over the style and content of student [or professor] speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns"); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1287 n.6, 1289 (10th Cir. 2004) (although "some circuits have cast doubt on the application of *Hazelwood* in the context of university *extracurricular* activities," *Hazelwood* is nevertheless "applicable in a university setting for speech that occurs in a classroom as part of a class curriculum"). Unlike this case, *Bishop* and *Axson-Flynn* both involved actions by university officials to control the content of speech in connection with the educational curriculum. Indeed, the Tenth Circuit expressly limited its holding in *Axson-Flynn* to "speech that occurs within a classroom." 356 F.3d at 1289. The decision below, therefore, stands alone in applying *Hazelwood* to a college newspaper operated as an extracurricular activity separate and apart from the university's educational curriculum.

majority as to the legal standard applicable to [plaintiff's] First Amendment claims. Thus, there is no majority opinion and no binding precedent with respect to any First Amendment principles." *Id.* at 956-57. For his part, Judge Reinhardt would have reversed the district court's grant of summary judgment and took pains to assert that:

> I vehemently disagree with Judge Graber's conclusion that *Hazelwood* provides the appropriate First Amendment standard for college and graduate student speech and begin this section by emphasizing that her opinion on this point is hers alone and is not joined by any other judge on this panel.

Id. at 960.

Especially in the wake of this uncertainty in the lower courts, the Seventh Circuit's decision to extend *Hazelwood* to the public colleges and universities of this nation, a decision rendered in the context of a case in which the student expression at issue constituted an extracurricular activity engaged in by adult students separate and apart from the university's educational curriculum, raises an important issue of federal law that, if left unaddressed by this Court, threatens to have profound implications for freedom of expression in higher education. As this Court explained in *Keyishian v. Board of Regents of the University of New York*, 385 U.S. 589, 603 (1967):

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

See also Healy, 408 U.S. at 180-81 ("[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom").

This Court's traditional dedication to preserving academic freedom has extended to all members of the academic community, students and faculty alike, and the Court's vigilance has been at its zenith in the context of public colleges and universities. As Justice Kennedy emphasized in his opinion for the Court in *Rosenberger*, 515 U.S. at 835-36:

> [T]he chilling of individual thought and expression . . . is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. . . . [U]niversities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.

Indeed, although a university's unique role as the quintessential marketplace of ideas makes it an ideal setting for the free exchange of competing views, that role likewise renders it particularly susceptible to efforts to suppress them. In recent years, for example, many colleges and universities

have experimented with so-called campus "speech codes" which, although ostensibly designed to combat harassment on the basis of race, sex, disability and other classifications, have often swept within their ambit a substantial amount of protected speech. *See, e.g.*, *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182-84 (6th Cir. 1995) (university speech code that, among other things, prohibited the use of "symbols, [epithets] or slogans that infer negative connotations about an individual's racial or ethnic affiliation" void as overbroad and vague); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 370 (M.D. Pa. 2003) (campus speech code unconstitutionally overbroad where, *inter alia*, it directed students to "communicate their beliefs 'in a manner that does not provoke, harass, intimidate, or harm another'").[11] Similarly in recent years, several colleges and universities have undertaken to limit student protests and demonstrations to designated areas on public campuses, arguing that such "free speech zones" constitute nothing more than reasonable time, place and manner restrictions.[12]

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[11] In 2003, the Foundation for Individual Rights in Education reported that, of the 176 colleges it surveyed, 76 restricted speech that otherwise would be protected off campus. *Political correctness squelching campus speech, group says*, Associated Press, Oct. 30, 2003.

[12] *See* Thomas J. Davis, *Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum Doctrine*, 79 Ind. L.J. 267, 267-68 (2004):

> In September 2000, a student at New Mexico State University was arrested after disobeying a police officer's request to stop leafleting outside the student union because it was not an "open forum area." At the University of Mississippi in the same year, a student was arrested for protesting the student newspaper outside the school's only designated speech area. In November 2001, police ejected a West Virginia University student from a Disney on-campus recruiting seminar because the student had previously handed out anti-Disney flyers outside of the designated

Absent review by this Court, the Seventh Circuit's decision in this case, which extends the deference from First Amendment scrutiny articulated in *Hazelwood* broadly to student expression at public colleges and universities, will surely accelerate the promulgation of such regulations across the nation. As Judge Reinhardt observed in his dissenting opinion in *Brown v. Li*, 308 F.3d at 962, the "suggestion that we import the *Hazelwood* standard into the college and university context is particularly unfortunate, because the standard is a deferential one that courts often use to justify highly questionable actions by high school educators that restrict controversial speech."[13] Accordingly, this Court should grant the petition and provide meaningful guidance to the lower courts as they continue to grapple with the appropriate reach of *Hazelwood* across a broad spectrum of issues at the core of our historic commitment to free expression on college campuses.

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zone. And in 2002, twelve Florida State University students were arrested for trespassing after refusing to move their protest from in front of the administration building to a less visible "demonstration zone."

[13] *See also, e.g.*, Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the "College Hazelwood" Case*, 68 Tenn. L. Rev. 481, 498-99 (2001) (citing examples of post-*Hazelwood* censorship of high school press including one school's refusal to publish an article concerning the arrest of the school superintendent for drunk driving because, the school contended, the student newspaper should not be used as a forum for criticism).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their Petition for a Writ of Certiorari be granted.

September 16, 2005

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-4155
MARGARET L. HOSTY, JENI S. PORCHE,
and STEVEN P. BARBA,

Plaintiffs-Appellees,

v.

PATRICIA CARTER,

Defendant-Appellant,

and

GOVERNORS STATE UNIVERSITY, et al.,

Defendants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 01 C 500—**Suzanne B. Conlon,** *Judge.*

ARGUED JANUARY 7, 2003—DECIDED APRIL 10, 2003
REARGUED EN BANC JANUARY 8, 2004—DECIDED
JUNE 20, 2005

Before FLAUM, *Chief Judge*, and POSNER, COFFEY, EASTERBROOK, RIPPLE, MANION, KANNE, ROVNER, WOOD, EVANS, and WILLIAMS, *Circuit Judges*.[†]

EASTERBROOK, *Circuit Judge*. Controversy began to swirl when Jeni Porche became editor in chief of the *Innovator*, the student newspaper at Governors State University. None of the articles concerned the apostrophe missing from the University's name. Instead the students tackled meatier fare, such as its decision not to renew the teaching contract of Geoffrey de Laforcade, the paper's faculty adviser.

I

After articles bearing Margaret Hosty's by-line attacked the integrity of Roger K. Oden, Dean of the College of Arts and Sciences, the University's administration began to take intense interest in the paper. (Here, and in Part II of this opinion as well, we relate matters in the light most favorable to the plaintiffs.) Both Oden and Stuart Fagan (the University's President) issued statements accusing the *Innovator* of irresponsible and defamatory journalism. When the *Innovator* declined to accept the administration's view of its duties—in particular, the paper refused to retract factual statements that the administration deemed false, or even to print the administration's responses—Patricia Carter, Dean of Student Affairs and Services, called the *Innovator*'s printer and told it not to print any issues that she had not reviewed and approved in advance. The printer was not willing to take the risk that it would not be paid (the paper relies on student activity funds), and the editorial staff was unwilling to submit to prior review. Publication ceased in

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[†] Circuit Judge Sykes, who joined the court after the oral argument, did not participate in the consideration or decision of this case.

November 2000. The paper has since resumed publication under new management; Porche, Hosty, and Steven Barba, another of the paper's reporters, have continued the debate in court, suing the University, all of its trustees, most of its administrators, and several of its staff members for damages under 42 U.S.C. § 1983.

Defendants moved for summary judgment, and the district court granted the motion with respect to all except Dean Carter. 2001 U.S. Dist. LEXIS 18873 (N.D. Ill. Nov. 13, 2001); see also 174 F. Supp. 2d 782 (N.D. Ill. 2001). Some defendants prevailed because, in the district judge's view, they had not done anything wrong (or, indeed, anything at all, and § 1983 does not create vicarious liability); others received qualified immunity. As for Carter, however, the judge thought that the evidence could support a conclusion that threatening to withdraw the *Innovator*'s financial support violated the first amendment to the Constitution (applied to the University, as a unit of state government in Illinois, through the fourteenth). Although *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), holds that faculty may supervise and determine the content of a student newspaper, the district court thought that decision limited to papers published by high school students as part of course work and inapplicable to student newspapers edited by college students as extracurricular activities—and the judge added that these distinctions are so clearly established that no reasonable person in Carter's position could have thought herself entitled to pull the plug on the *Innovator*. Carter took an interlocutory appeal to pursue her claim of qualified immunity. See *Behrens v. Pelletier*, 516 U.S. 299 (1996). A panel of this court affirmed, 325 F.3d 945 (2003), and we granted Carter's petition for rehearing en banc.

When entertaining an interlocutory appeal by a public

official who seeks the shelter of qualified immunity, the threshold question is: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the [public official's] conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201 (2001). See also, e.g., *Brosseau v. Haugen*, 125 S. Ct. 596, 598 (2004); *Newsome v. McCabe*, 319 F.3d 301, 303-04 (7th Cir. 2003). Only if the answer is affirmative does the court inquire whether the official enjoys qualified immunity. "[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Saucier*, 533 U.S. at 201. We address the issues in the order *Saucier* specifies: the existence of a constitutional claim in Part II and immunity in Part III.

II

A

Hazelwood provides our starting point. A high school's principal blocked the student newspaper (which was financed by public funds as part of a journalism class) from publishing articles that the principal thought inappropriate for some of the school's younger students and a potential invasion of others' privacy. When evaluating the students' argument that the principal had violated their right to freedom of speech, the Court first asked whether the paper was a public forum. 484 U.S. at 267-70. After giving a negative answer based on the school's established policy of supervising the writing and reviewing the content of each issue, the Court observed that the school's subvention of the paper's costs distinguished the situation from one in which students were speaking independently, as in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). When a school regulates speech for which it also pays, the Court

held, the appropriate question is whether the "actions are reasonably related to legitimate pedagogical concerns." 484 U.S. at 273. "Legitimate" concerns, the Court stated, include setting "high standards for the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the 'real' world—and [the school] may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting." *Id.* at 271-72. Shortly after this passage the Court dropped a footnote: "A number of lower federal courts have similarly recognized that educators' decisions with regard to the content of school-sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference. We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." *Id.* at 273-74 n.7 (citations omitted).

Picking up on this footnote, plaintiffs argue, and the district court held, that *Hazelwood* is inapplicable to university newspapers and that post-secondary educators therefore cannot ever insist that student newspapers be submitted for review and approval. Yet this footnote does not even hint at the possibility of an on/off switch: high school papers reviewable, college papers not reviewable. It addresses degrees of deference. Whether *some* review is possible depends on the answer to the public-forum question, which does not (automatically) vary with the speakers' age. Only when courts need assess the reasonableness of the asserted

pedagogical justification in non- public-forum situations does age come into play, and in a way suggested by the passage we have quoted from *Hazelwood*'s text. To the extent that the justification for editorial control depends on the audience's maturity, the difference between high school and university students may be important. (Not that any line could be bright; many high school seniors are older than some college freshmen, and junior colleges are similar to many high schools.) To the extent that the justification depends on other matters—not only the desire to ensure "high standards for the student speech that is disseminated under [the school's] auspices" (the Court particularly mentioned "speech that is . . . ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences", 484 U.S. at 271) but also the goal of dissociating the school from "any position other than neutrality on matters of political controversy", *id.* at 272—there is no sharp difference between high school and college papers.

The Supreme Court itself has established that age does not control the public-forum question. See generally *Symposium: Do Children Have the Same First Amendment Rights As Adults?*, 79 Chi.-Kent L. Rev. 3-313 (2004) (including many articles collecting and discussing these decisions). So much is clear not only from decisions such as *Tinker*, which held that public school students have a right of non-disruptive personal expression on school premises, but also from the decisions concerning the use of school funds and premises for religious expression. See, e.g., *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). See also *Hedges v. Wauconda Community Unit School District*

No. 118, 9 F.3d 1295 (7th Cir. 1993). These decisions hold that no public school, of any level—primary, secondary, or post-secondary—may discriminate against religious speech in a public forum (including classrooms made available to extracurricular activities), or withhold funding that would be available to student groups espousing sectarian views. *Good News Club*, which dealt with student clubs in an elementary school, deemed dispositive (533 U.S. at 110) a decision about the first amendment rights of college students. Having opened its premises to student clubs, and thus created a limited-purpose public forum, even an elementary school could not supervise or censor the views expressed at a meeting of the Good News Club.

If private speech in a public forum is off-limits to regulation even when that forum is a classroom of an elementary school (the holding of *Good News Club*) then speech at a non-public forum, and underwritten at public expense, may be open to reasonable regulation even at the college level—or later, as *Rust v. Sullivan*, 500 U.S. 173 (1991), shows by holding that the federal government may insist that physicians use grant funds only for the kind of speech required by the granting authority. Cf. *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998). We hold, therefore, that *Hazelwood*'s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools. See also *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004) (*Hazelwood* supplies the framework for evaluating collegiate speech and allows regulation when the speech is connected to the curriculum); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) (*Hazelwood* supplies the framework for evaluating collegiate speech and allows regulation when readers might infer the school's approval).

B

Hazelwood's first question therefore remains our principal question as well: was the reporter a speaker in a public forum (no censorship allowed?) or did the University either create a non-public forum or publish the paper itself (a closed forum where content may be supervised)? Plaintiffs contend, and the district court agreed, that the Court found a public forum missing in *Hazelwood* only because the paper was prepared as part of the journalism curriculum. By contrast, the *Innovator* was an extracurricular activity, and thus beyond all control, the district court concluded. Yet if the Constitution establishes a bright line between curricular activities and all other speech, then decisions such as *Rust* and *Finley* are inexplicable, for they hold that speakers who have completed their education still must abide by the conditions attached to public subsidies of speech and other expressive activities. See also Robert C. Post, *Subsidized Speech*, 106 Yale L.J. 151 (1996).

Suppose the University had given the *Innovator* $10,000 to publish a semester's worth of newspapers, and Porche then had decided that the students would get more benefit from a booklet describing campus life and cultural activities in the surrounding neighborhoods. Both paper and booklet are forms of speech, but the fact that the publication was not part of the University's curriculum and did not carry academic credit would not have allowed Porche to divert the money from one kind of speech to the other.

Or suppose that the publication in question were one under the University's direct management—say, its alumni magazine. If the University offered course credit to journalism students who prepared a publishable puff piece,

the right to control would be evident. The University, after all, is the alumni magazine's publisher; the contents are *its* speech; units of state and local government are entitled to speak for themselves. See *Johanns v. Livestock Marketing Ass'n*, No. 03-1164 (U.S. May 23, 2005), slip. op. 6-8; *University of Wisconsin v. Southworth*, 529 U.S. 217, 229 (2000); *Keller v. State Bar*, 496 U.S. 1, 12-13 (1990). That institutions can speak only through agents does not allow the agents to assume control and insist that submissions graded D-minus appear under the University's masthead. *Livestock Marketing Ass'n* has dispelled all doubt on that score.

Now take away the course credit and assume that the alumni magazine hires students as stringers and pays by the word for any articles accepted and printed. The University would remain the operator of this non-public forum and could pick and choose from among the submissions, printing only those that best expressed the University's own viewpoint. Thus although, as in *Hazelwood*, being part of the curriculum may be a *sufficient* condition of a non-public forum, it is not a *necessary* condition. Extracurricular activities may be outside any public forum, as our alumni-magazine example demonstrates, without also falling outside all university governance. Let us not forget that academic freedom includes the authority of the university to manage an academic community and evaluate teaching and scholarship free from interference by other units of government, including the courts. See *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990); *University of Michigan v. Ewing*, 474 U.S. 214 (1985); *Southworth*, 529 U.S. at 237-39 (Souter, J., concurring).

What, then, was the status of the *Innovator?* Did the University establish a public forum? Or did it hedge the funding with controls that left the University itself as the newspaper's publisher? If the paper operated in a public forum, the University could not vet its contents. See *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975). But if underwritten student publications at Governors State University are a non-public forum, then it becomes important whether Dean Carter had legitimate pedagogical reasons for her action. We do not think it possible on this record to determine what kind of forum the University established or evaluate Dean Carter's justifications. But the question posed by *Saucier* is not who wins in the end, but whether the evidence makes out a constitutional claim when taken in the light most favorable to the plaintiff. These facts would permit a reasonable trier of fact to conclude that the *Innovator* operated in a public forum and thus was beyond the control of the University's administration.

The *Innovator* did not participate in a traditional public forum. Freedom of speech does not imply that someone else must pay. The University does not hand out money to everyone who asks. But by establishing a subsidized student newspaper the University may have created a venue that goes by the name "designated public forum" or "limited-purpose public forum". See *United States v. American Library Association,* 534 U.S. 194 (2003); *United States v. Kokinda,* 497 U.S. 720 (1990); *Perry Education Association v. Perry Local Educators' Association,* 460 U.S. 37 (1983). Participants in such a forum, declared open to speech *ex ante,* may not be censored *ex post* when the sponsor decides that particular speech is unwelcome. The classrooms used for meetings in *Good News Club* were designated public forums,

and because the school allowed any student group to use the space the Court held that it could not forbid religious speech. In the same way, a school may declare the pages of the student newspaper open for expression and thus disable itself from engaging in viewpoint or content discrimination while the terms on which the forum operates remain unaltered. Dean Carter did not purport to alter the terms on which the *Innovator* operated: that authority belonged to the Student Communications Media Board. And the rules laid down by the Board, though ambiguous, could be thought (when considered as favorably to plaintiffs as the record allows) to create a designated public forum.

Defendants concede that the Board is the publisher of the *Innovator* and other subsidized print and broadcast media. The Board has seven members, all chosen by the Student Senate: four students, two faculty members, and one "civil service or support unit employee of the university." The Board determines how many publications it will underwrite (subject to the availability of funds, which as in *Southworth* and *Rosenberger* come from student activities fees), and the general character of each. It appoints "for the period of one year, the head of each student media staff." The Board's policy is that each funded publication "will determine content and format . . . without censorship or advance approval". If this is all there is to it, then the *Innovator* is in the same position as the student speakers in *Southworth* and *Rosenberger*: a designated public forum has been established, and the faculty cannot censor speech within it. When viewing matters in the light most favorable to the students, we stop here, because other matters are cloudy.

Two things have the potential to cast matters in a different light if a trial were to occur. One is that the Board's charter provides that it is "responsible to the Director of Student

Life." Perhaps the Director of Student Life (who appears to be one of Dean Carter's subordinates) has established criteria for subsidized student publications. None is in the record, however, so this possibility does not matter. The other is that each funded publication has a faculty adviser. The parties disagree not only about who the adviser was at the critical time (plaintiffs say that de Laforcade remained their adviser even after he left the University's faculty; Carter insists that a different person filled that position) but also about whether the adviser just offers advice (plaintiffs' view) or exercises some control (Carter's view). Because the district court acted on a motion for summary judgment, it assumed (as do we) that plaintiffs' perspective is the correct one. On that understanding, the Board established the *Innovator* in a designated public forum, where the editors were empowered to make their own decisions, wise or foolish, without fear that the administration would stop the presses.

III

Qualified immunity nonetheless protects Dean Carter from personal liability unless it should have been "clear to a reasonable [public official] that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition". *Id.* at 201. See also, e.g., *Wilson v. Layne*, 526 U.S. 603, 614-18 (1999); *Anderson v. Creighton*, 483 U.S. 635 (1987); *Greenberg v. Kmetko*, 840 F.2d 467 (7th Cir. 1988) (en banc). One might well say as a "broad general proposition" something like "public officials may not censor speech in a designated public forum," but whether Dean Carter was bound to know that the *Innovator* operated in such a forum is a different question altogether.

The district court held that any reasonable college administrator should have known that (a) the approach of *Hazelwood* does not apply to colleges; and (b) only speech that is part of the curriculum is subject to supervision. We have held that neither of these propositions is correct—that *Hazelwood*'s framework is generally applicable and depends in large measure on the operation of public-forum analysis rather than the distinction between curricular and extracurricular activities.

But even if student newspapers at high schools and colleges operate under different constitutional frameworks, as both the district judge and our panel thought, it greatly overstates the certainty of the law to say that any reasonable college administrator had to know that rule. The question had been reserved in *Hazelwood,* and the Supreme Court does not identify for future decision questions that already have "clearly established" answers. See *Wilson v. Layne,* 526 U.S. 603, 614-18 (1999). Post-*Hazelwood* decisions likewise had not "clearly established" that college administrators must keep hands off all student newspapers. As we mentioned in Part II.A, the tenth and eleventh circuits have used *Hazelwood* as the framework for evaluating the acts of colleges as well as high schools. One circuit has said otherwise. See *Student Government Ass'n v. University of Massachusetts,* 868 F.2d 473, 480 n.6 (1st Cir. 1989) (asserting, in sole reliance on *Hazelwood*'s footnote 7, that the Supreme Court itself "holds" that *Hazelwood*'s approach does not apply to post-secondary education). The approach of others is hard to classify. See *Kincaid v. Gibson,* 236 F.3d 342, 346 n. 5 (6th Cir. 2001) (en banc) (stating, in reliance on the parties' agreement, that *Hazelwood* has "little application" to collegiate publications but not explaining what this means, or how a constitutional framework can apply "just a little"). This circuit had not spoken on the

subject until our panel's opinion, which post-dated Dean Carter's actions.

Many aspects of the law with respect to students' speech, not only the role of age, are difficult to understand and apply, as we remarked in *Baxter v. Vigo County School Corp.*, 26 F.3d 728 (7th Cir. 1994), when holding school administrators entitled to qualified immunity for banning certain message-bearing T-shirts that the elementary-school pupils claimed were protected under *Tinker*. See also, e.g., *Brown v. Li*, 308 F.3d 939 (9th Cir. 2003), in which the members of the appellate panel articulated three distinct and incompatible views about whether *Hazelwood* applies to collegiate settings and how the first amendment affects relations between college faculty and students' expression.

Neither plaintiffs, who have elected to appear *pro se*, nor the *amici curiae* who have ably supported their position in this court, contend that Dean Carter owes damages from her own purse if *Hazelwood* establishes the appropriate legal framework. For reasons that should by now be evident, the implementation of *Hazelwood* means that both legal and factual uncertainties dog the litigation—and it is the function of qualified immunity to ensure that such uncertainties are resolved by prospective relief rather than by financial exactions from public employees. "Qualified immunity shields an official from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau*, 125 S. Ct. at 599. That description is as apt here as it was in *Brosseau*.

Public officials need not predict, at their financial peril, how constitutional uncertainties will be resolved. Disputes about both law and fact make it inappropriate to say that any

reasonable person in Dean Carter's position in November 2000 had to know that the demand for review before the University would pay the *Innovator*'s printing bills violated the first amendment. She therefore is entitled to qualified immunity from liability in damages.

REVERSED.

EVANS, *Circuit Judge*, joined by ROVNER, WOOD, and WILLIAMS, *Circuit Judges*, dissenting. In concluding that *Hazelwood* extends to a university setting, the majority applies limitations on speech that the Supreme Court created for use in the *narrow* circumstances of elementary and secondary education. Because these restrictions on free speech rights have no place in the world of college and graduate school, I respectfully dissent.

The majority's conclusion flows from an incorrect premise—that there is no legal distinction between college and high school students. In reality, however, "[t]he Court long has recognized that the status of minors under the law is unique in many respects." *Bellotti v. Baird*, 443 U.S. 622, 633 (1979). Age, for which grade level is a very good indicator,[1] has always defined legal rights. As the Court has noted:

> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are

[1] According to the U.S. Census Bureau, only about one percent of those enrolled in American colleges and universities in 2002 were under the age of 18. *See* 2002 U.S. Census Bureau Current Population Survey (CPS) Rep., Table A-6, "Age Distribution of College Students 14 years Old and Over, by Sex: October 1947 to 2002."

> protected by the Constitution and possess constitutional rights. The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults.

Planned Parenthood of Missouri. v. Danforth, 428 U.S. 52, 74 (1976) (internal citations omitted).

This principle is clear with respect to free speech rights, where the Court has delineated a consistent line between high-school-age students and those at the university level. As the Court noted in *Board of Regents of the University of Wisconsin System v. Southworth,* 529 U.S. 217, 238 n.4 (2000), "the right of teaching institutions to limit expressive freedom of students ha[s] been confined to high schools whose students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education." (Internal citations omitted.) *See also Healy v. James,* 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.").

There are two reasons why the law treats high school students differently than it treats college students, who "are, of course, young adults," *Widmar v. Vincent,* 454 U.S. 263, 274 n.14 (1981): high school students are less mature and the missions of the respective institutions are different. These differences make it clear that *Hazelwood* does not apply beyond high school contact.

It is self-evident that, as a general matter, juveniles are less mature than adults. Indeed, "during the formative years of

childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti*, 443 U.S. at 635. *See also Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring) (footnote omitted) ("[A]t least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."). It is this reasoning that dictated the results in *Hazelwood* and *Bethel School District No. 403 v. Fraser*. In *Hazelwood*, the Court emphasized that a different First Amendment standard is appropriate in a high school setting because those students are young, emotionally immature, and more likely to be inappropriately influenced by school-sponsored speech on controversial topics. *Hazelwood*, 484 U.S. at 272. It was, therefore, reasonable to restrict publication of an article about teenage pregnancy. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), where the Court permitted a high school to sanction a student for making a lewd student council election speech, makes a similar point. The Court emphasized that "[t]he speech could well be seriously damaging to its *less mature* audience. . . ." *Id.* at 683-84 (emphasis added).[2] The same concerns simply do not apply to college students, who are certainly (as a general matter) more mature, independent thinkers. *Tilton v. Richardson*, 403 U.S. 672, 686 (1971), establishes this point. The Court upheld a federal law that provided funding to church-related colleges and universities for construction of facilities for secular educational purposes.

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[2] Other decisions of the Court outside the free speech arena likewise emphasize that greater restrictions are permitted on the rights of juveniles because they are less mature. For example, in *Lee v. Weisman*, 505 U.S. 577 (1992), the Court noted that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Id.* at 592.

The Court noted that pre-college students may not have the maturity to make their own decisions on religion; however, "college students are less impressionable and less susceptible to religious indoctrinations."

Not only is there a distinction between college and high school students themselves, the missions of the two institutions are quite different. Elementary and secondary schools have "custodial and tutelary responsibility for children," *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 829-30 (2002) (holding that "Fourth Amendment rights . . . are different in public schools than elsewhere"), and are largely concerned with the "inculcation" of "values." *Fraser*, 478 U.S. at 683; *see also Ambach v. Norwick*, 441 U.S. 68, 76 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions[.]"). A university has a different purpose—to expose students to a "marketplace of ideas." *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967) (emphasizing that the "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas . . . ."). *See also Bd. of Regents v. Southworth*, 529 U.S. 217, 231 (2000) ("[R]ecognition must be given as well to the important and substantial purposes of the University, which seeks to facilitate a wide range of speech."); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995) (noting that intellectual curiosity of students remains today a central determination of a university's success and asserting that restriction of that curiosity "risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses"); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (noting that an atmosphere of " 'speculation,

experiment and creation'" is "essential to the quality of higher education" (quoting *Sweezy v. New Hampshire,* 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring))); *Widmar,* 454 U.S. at 267-68 n.5 ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.' ").

As the Supreme Court perhaps best articulated in *Healy v. James:*

> [T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The college classroom with its surrounding environs is peculiarly the "'marketplace of ideas,'" and we break no new constitutional ground in affirming this Nation's dedication to safeguarding academic freedom.

408 U.S. 169, 180-81 (1972) (quoting *Shelton v. Tucker,* 364 U.S. 479, 487 (1960), and *Keyishian,* 385 U.S. at 603). Based on this important notion, I do not believe it is appropriate for this court to extend *Hazelwood* to the college and university setting.

The majority's holding, furthermore, is particularly unfortunate considering the manner in which *Hazelwood* has been used in the high school setting to restrict controversial speech. *See, e.g., Planned Parenthood v. Clark County Sch. Dist.,* 941 F.2d 817 (9th Cir. 1991) (holding that the school district's justification for refusing to publish family planning advertisements in high school newspapers was reasonable

under the *Hazelwood* standard); *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 737-38 (7th Cir. 1994) (upholding the decision of an elementary school principal who prohibited a student from wearing shirts with messages such as "Unfair Grades" and "Racism"); *Poling v. Murphy*, 872 F.2d 757, 764 (6th Cir. 1989) (upholding the decision of a high school administration to exclude a student from a student council race because he made a rude comment about the assistant principal in a speech delivered at a school assembly).

If the plaintiffs' allegations are true, this case epitomizes this concern. The *Innovator*, as opposed to writing merely about football games, actually chose to publish hard-hitting stories. And these articles were critical of the school administration. In response, rather than applauding the young journalists, the University decided to prohibit publication unless a school official reviewed the paper's content before it was printed. Few restrictions on speech seem to run more afoul of basic First Amendment values. First, prior restraints are particularly noxious under the Constitution. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights"); *Near v. Minnesota*, 283 U.S. 697, 713 (1931) ("it has been generally, if not universally, considered that it is the chief purpose of the [First Amendment's free press] guaranty to prevent previous restraints upon publication"). Second, and even more fundamental, as Justice Frankfurter stated (albeit in somewhat dated language) in *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944), "one of the prerogatives of American citizenship is the right to criticize public men and measures." College students—voting-age citizens and potential future leaders—should feel free to question, challenge, and criticize government action. Nevertheless, as a result of today's

holding, Dean Carter could have censored the *Innovator* by merely establishing "legitimate pedagogical reasons." This court now gives the green light to school administrators to restrict student speech in a manner inconsistent with the First Amendment.

Finally, I disagree with the majority's conclusion that Dean Carter is entitled to qualified immunity. Prior to *Hazelwood*, courts were consistently clear that university administrators could not require prior review of student media or otherwise censor student newspapers. *See, e.g., Stanley v. Magrath*, 719 F. 2d 279 (8th Cir. 1983); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975); *Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973); *Bazaar v. Fortune*, 476 F.2d 570 (5th Cir. 1973), *adopted en banc in* 489 F.2d 225 (5th Cir. 1973); *Trujillo v. Love*, 322 F. Supp. 1266 (D. Colo. 1971); *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970); *Dickey v. Alabama St. Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967), *vacated as moot sub nom. Troy St. Univ. v. Dickey*, 402 F.2d 515 (5th Cir. 1968); *Panarella v. Birenbaum*, 32 N.Y.2d 108, 343 N.Y.S. 2d 333 (N.Y. 1973); *Mazart v. State*, 109 Misc.2d 1092, 441 N.Y.S. 2d 600 (N.Y. Ct. Cl. 1981); *Milliner v. Turner*, 436 So. 2d 1300 (La. Ct. App. 1983).

Hazelwood did not change this well-established rule. So, the question becomes, did anything after *Hazelwood* occur that would suggest to a reasonable person in Dean Carter's position that she could prohibit publication simply because she did not like the articles it was publishing?[3] The answer is

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[3] Considering that the law was clearly established that college administrators could not control school newspapers, the majority wrongly focuses on the fact that post-*Hazelwood* decisions had not "clearly established that college administrators must keep hands off all student newspapers." The question is not whether later decisions established that

clearly "no." In fact, a review of the cases, including those the majority relies on, establishes that no case law would have led any reasonable official in Dean Carter's position to believe she had such power.

To begin, both the First Circuit (explicitly) and Sixth Circuit (implicitly) are of the view that *Hazelwood* does not apply in the university setting. In *Student Government Association v. Board of Trustees of the University of Massachusetts*, 868 F.2d 473, 480 n.6 (1st Cir. 1989), the First Circuit held that *Hazelwood* "is not applicable to college newspapers." In *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (en banc), a dispute involving a college yearbook, the court determined that *Hazelwood* had "little application" to the case. *Id.* at 346 n.5. In so noting, the court ruled that the university's yearbook constituted a limited public forum in which content-based regulations were subject to strict scrutiny. The court then held that the administration's decision to confiscate the yearbook, due to unhappiness over its content, violated the First Amendment.

The decisions the majority cites in support of its position, moreover, are inapplicable. *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), and *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), both concerned free speech rights *within* the classroom. *Bishop* held that a university could order a professor to stop interjecting his personal religious beliefs into his class comments during instruction time. *Axson-Flynn* held that an acting student at a university could be required to say script lines that conflict with her Mormon faith as part of the curriculum. These are very different

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college administrators "must keep hands off," but rather whether later decisions did anything to change the already clearly established rule. In other words, did decisions after *Hazelwood* say anything to suggest that college administrators *could* censor school newspapers.

situations than free speech rights of student journalists engaged in an extracurricular activity. Indeed, the Tenth Circuit recognized such a distinction and explicitly limited its holding: "We hold that the *Hazelwood* framework is applicable in a university setting for speech that occurs in a classroom as part of a class curriculum." *Id.* at 1289. It specifically noted, "We acknowledge that some circuits have cast doubt on the application of *Hazelwood* in the context of university *extracurricular* activities. However, because Axson-Flynn's speech occurred as part of a *curricular* assignment during class time and in the classroom, we need not reach any analysis of university's students' extracurricular speech." *Id.* at 1286 n.6 (emphasis added) (internal citations omitted). Finally, I am hard-pressed to see the relevance of *Settle v. Dickson County School Board*, 53 F.3d 152 (6th Cir. 1995). That case concerned a ninth grader who challenged her teacher's decision not to accept a research paper because it was on an unapproved topic. Regardless, *Kincaid*, not *Settle*, constitutes the Sixth Circuit's definitive word on the issue.[4]

Therefore, considering that no court, both before or after *Hazelwood*, has held that a university may censor a student newspaper, and the only authorities to suggest otherwise are not directly on point, I believe that it was "clearly

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[4] The majority wisely does not, as Dean Carter does, rely on the Ninth Circuit's decision in *Brown v. Li*, 308 F.3d 939 (2002), *cert. denied*, 538 U.S. 908 (2003), and the decision of a panel of the Sixth Circuit in *Kincaid*, 191 F.3d 719 (1999). With respect to *Brown*, only one judge on the panel, Judge Graber, approved of the application of *Hazelwood*. Judge Graber, moreover, applied *Hazelwood* only in the context of a student's masters thesis included in the school's curriculum. *Brown*, 308 F.3d at 949. Again, a very different situation than the one presented here. As for *Kincaid*, that panel decision had already been vacated by the full circuit when Dean Carter restrained publication of the *Innovator*. *See* 197 F.3d at 828 (6th Cir. 1999) (vacating panel decision).

established" that the University could not deny funding to the school newspaper it found objectionable.

The majority also states that Dean Carter is entitled to qualified immunity because "A reasonable person in Dean Carter's position was not bound to recognize that the *Innovator* operated in a designated public forum." Although an objective standard, I believe it is noteworthy that, as the district court noted, "Defendants concede that the Innovator serves as a public forum." 174 F. Supp. 2d 782, 786 (N.D. Ill. 2001). A review of the facts, accepting all well-pleaded allegations in the complaint as true and drawing all reasonable inferences in favor of the plaintiff, support Dean Carter's litigation strategy below. Governors State University, by express policy and practice, placed exclusive editorial control of the newspaper with the student editors. Indeed, its own policy stated that the student staff "will determine content and format of their respective publications without censorship or advance approval." The *Innovator* is an independent publication organized and published by students on their own time. The publication is not part of an academic program, but rather an extracurricular activity. The students are provided an advisor, but it is not a class taught by a faculty member, and the advisor did not make any content decisions, only advice was offered. Considering these facts, a reasonable person in Dean Carter's shoes would have believed the *Innovator* operated as a public forum.

In conclusion, because I believe that *Hazelwood* does not apply, no pedagogical concerns can justify suppressing the student speech here. Dean Carter violated clearly established First Amendment law in censoring the student newspaper. I would affirm the judgment of the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-4155
MARGARET HOSTY, JENI PORCHE, and
STEVEN P. BARBA, individually and d/b/a INNOVATOR,

Plaintiffs-Appellees,

v.

PATRICIA CARTER,

Defendant-Appellant,

and

GOVERNORS STATE UNIVERSITY; BOARD OF TRUSTEES OF GOVERNORS STATE UNIVERSITY; DONALD BELL; TOMMY DASCENZO; STUART FAGAN; PAUL KEYS; JANE WELLS; DEBRA CONWAY; PEGGY WOODARD; FRANCIS BRADLEY; PETER GUNTHER; ED KAMMER; DOROTHY FERGUSON; JUDY YOUNG; CLAUDE HILL IV; and PAUL SCHWELLENBACH,

Defendants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 01 C 500—**Suzanne B. Conlon,** *Judge.*

ARGUED JANUARY 7, 2003—DECIDED APRIL 10, 2003

Before COFFEY, ROVNER, and EVANS, *Circuit Judges*.

EVANS, *Circuit Judge*. Fifteen years ago, in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Supreme Court held that high school administrators have broad powers to censor school-sponsored newspapers if their actions are supported by valid educational purposes. In this case, involving an appeal from an order denying summary judgment on qualified immunity grounds, we are asked to consider whether the principles of *Hazelwood* apply to public college and university students.

The three plaintiffs in this case—Porche, Hosty, and Baron[5]—are (or, when this case began, were) students at Governors State University, a state-run institution in University Park, Illinois. They were appointed by the school's "Student Communications Media Board" (SCMB) to serve as editor-in-chief, managing editor, and staff reporter for its newspaper, the *Innovator*, which is supported by student activity fees. According to the plaintiffs, whose claims we must credit at this stage of the proceedings, they occasionally published articles and letters to the editor that were critical of certain faculty members and the school's administration.

When our three plaintiffs took their positions at the *Innovator* and during all times relevant to this lawsuit, the policy of the SCMB was that the student staff of the *Innovator* "will determine content and format of their respective publications *without censorship or advance approval*." (Emphasis added.) Although the newspaper's

[5] The district court and the Illinois attorney general use "Barba." We use "Baron," the name the plaintiffs-appellees use.

faculty adviser often read stories intended for publication at the request of the student editors, the adviser did not make content decisions. Only advice was offered.

In the fall of 2000, Patricia Carter, the university's dean of Student Affairs and Services, twice called Charles Richards, president of Regional Publishing, the company which held the contract for printing the *Innovator*. In those calls, Dean Carter told Richards that a school official must review the *Innovator*'s content before it could be printed. She instructed Richards to call her when he received future issues of the paper.

In a November 14, 2000, memo delivered to the *Innovator* editors, Richards relayed the substance of his conversations with Dean Carter. He said Dean Carter told him his company was not to publish any more issues of the *Innovator* without prior approval by a university official. He noted, however, that his understanding of the law was that prior approval by school officials was not cricket. However, he also observed that he was "no attorney, so that the final decision of the handling of this matter should not be left to me." The student editors understood Richards' comments to mean that his company would not print additional editions of the paper until the issue of Dean Carter's prior approval requirement was settled. A company representative confirmed that it did not want to risk printing the newspaper and then not get paid for the effort.

Sparks were ready to fly. The student editors filed this suit against 17 defendants, listing a litany of grievances in their complaint. Ultimately, all defendants were dismissed (mostly due to Eleventh Amendment problems) from the suit. All, that is, except Dean Carter, who unsuccessfully tried to escape on a claim of qualified immunity. She is here today

on a narrow interlocutory appeal from the district court's order denying her request to exit the suit before any further proceedings are required.

The pivotal issue for us is whether Dean Carter was entitled to qualified immunity. Her claim is that the law was not clearly established that her request to review and approve the *Innovator* prior to printing might violate the student editors' rights under the First Amendment.

Qualified immunity protects government officials performing discretionary functions when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). For several decades, courts have consistently held that student media at public colleges and universities are entitled to strong First Amendment protections. These courts have held that school administrators can only censor student media if they show that the speech in question is legally unprotected or if they can demonstrate that some significant and imminent physical disruption of the campus will result from the publication's content. Attempts by school officials, like Dean Carter here, to censor or control constitutionally protected expression in student-edited media have consistently been viewed as suspect under the First Amendment. *See, e.g., Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (university officials constitutionally prohibited from denying funding to student religious magazine based on content); *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (en banc) (confiscation of college student yearbook by administrators unhappy with content violates First Amendment). The prohibition on administrative censorship has extended to cases where school officials required mandatory prior review of student media, *Antonelli v. Hammond*, 308 F. Supp. 1329

(D. Mass. 1970); *Mazart v. State*, 441 N.Y.S.2d 600 (N.Y. Ct. Cl. 1981); *Milliner v. Turner*, 436 So. 2d 1300 (La. Ct. App. 1983); *Trujillo v. Love*, 322 F. Supp. 1266 (D. Colo. 1971), and other indirect forms of censorship, when undertaken to affect content. *See, e.g., Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983) (striking down university's attempt to restructure funding to student newspaper because of controversial issue); *Dickey v. Alabama St. Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967), *vacated as moot sub nom. Troy St. Univ. v. Dickey*, 402 F.2d 515 (5th Cir. 1968) (suspension of student newspaper editor for content related reasons held unconstitutional); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975) (reinstating student editors who had been removed because of administrators' objections to poor grammar, spelling, and syntax).

As one federal court of appeals noted in 1973:

> Censorship of constitutionally protected expression cannot be imposed by suspending the editors, suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censorial oversight based on the institution's power of the purse.

Joyner v. Whiting, 477 F.2d 456, 460 (4th Cir. 1973).

The court of appeals for the Fifth Circuit, sitting *en banc*, expressed similar sentiments in ruling that University of Mississippi officials acted illegally when they prohibited the publication of a school-sponsored student literary magazine because it contained "earthy language":

> The University here is clearly an arm of the state and

> this single fact will always distinguish it from the purely private publisher as far as censorship rights are concerned. It seems a well-established rule that once a University recognizes a student activity which has elements of free expression, it can act to censor that expression only if it acts consistent with First Amendment constitutional guarantees.

Bazaar v. Fortune, 476 F.2d 570, 574 (5th Cir. 1973), *adopted en banc in* 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 1995 (1974).

Dean Carter's contention that she could not reasonably have known that it was illegal to order the *Innovator*'s printer to halt further publication of the newspaper or to require prior approval of the newspaper's content defies existing, well-established law. Because her actions, if true, violated clear constitutional rights of which she should have been aware, the district court was correct to decline her request to exit the suit via qualified immunity, if *Hazelwood* has not muddled the landscape to such an extent that the law has become unclear.

In *Hazelwood*, the Supreme Court determined that "the First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings and must be applied in light of the special characteristics of the school environment." *Hazelwood*, 484 U.S. at 266 (internal citations and quotation marks omitted). But *Hazelwood*'s rationale for limiting the First Amendment rights of high school journalism students is not a good fit for students at colleges or universities. The differences between a college and a high school are far greater than the obvious differences in curriculum and extracurricular activities. The

missions of each are distinct reflecting the unique needs of students of differing ages and maturity levels.

According to U.S. Census Bureau statistics, provided to us in a superb *amicus* brief filed by attorney Richard M. Goehler on behalf of a bevy of student press associations, only 1 percent of those enrolled in American colleges or universities are under the age of 18, and 55 percent are 22 years of age or older. Treating these students like 15-year-old high school students and restricting their First Amendment rights by an unwise extension of *Hazelwood* would be an extreme step for us to take absent more direction from the Supreme Court.

The Supreme Court's restrictive First Amendment standard in *Hazelwood* sprang from its premise that the special circumstances of a secondary school environment permit school authorities to exercise greater control over expression by students than the First Amendment would otherwise permit. However, the judicial deference the Supreme Court found necessary in the high school setting—and in the factual context of *Hazelwood*—is inappropriate for a university setting. This difference was acknowledged by the Court when it explicitly reserved the question of whether the same level of deference it expressed would be "appropriate with respect to school-sponsored expressive activities at the college and university level." *Hazelwood*, at 273 n.7.

The Supreme Court has recognized that where the "vital" principles of the First Amendment are at stake, "[t]he first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression."

Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 835 (1995). These dangers are especially threatening in the university setting, where the creative power of student intellectual life remains "a vital measure of a school's influence and attainment." *Id.* at 836.

While *Hazelwood* teaches that younger students in a high school setting must endure First Amendment restrictions, we see nothing in that case that should be interpreted to change the general view favoring broad First Amendment rights for students at the university level. And so we conclude that Dean Carter does not enjoy qualified immunity in this suit.

Unrelated, at least directly, to the qualified immunity issue are a few minor matters we can quickly dispatch. First, Dean Carter says the plaintiffs should have submitted copies of potential newspaper articles to the district court because the court must know what "speech" falls within the First Amendment. She contends that not doing so is a "complete failure of proof" entitling her to summary judgment. While copies of the articles that might have been published in future issues of the *Innovator* are not in the record, there is a copy of the October 31, 2000, paper. Dean Carter makes no argument that this issue of the paper lacked constitutional protection, and there is nothing in the record indicating that future copies of the *Innovator* would have differed.

Dean Carter also contends that no constitutional violation occurred because she did not actually restrict publication of the paper. She says that the plaintiffs themselves decided not to send further issues of the *Innovator* to Regional Publishing and that they did not publish an issue in December even after an administrator gave them permission to do so. Affidavits, however, show that Regional Publishing was unlikely to print another copy of the paper after Dean Carter's phone call

because of her reference to the university's control of the *Innovator*'s purse strings. Furthermore, interpreting the evidence in the light most favorable to the plaintiffs, there would have been no point in publishing a December issue of the *Innovator* after the staff received permission to do so because students were already out of town on winter break. Dean Carter's call, viewed in the light most favorable to the students, caused both Richards' apprehension in publishing another paper and the delay that made publishing a second one futile.

For these reasons, we AFFIRM the order of the district court denying Dean Carter's summary judgment motion on qualified immunity grounds, and we return the case to that court for further proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARGARET HOSTY, et al.,	)	
Plaintiffs,	)	
	)	No. 01 C 0500
v.	)	
	)	Suzanne B. Conlon,
	)	Judge
GOVERNORS STATE UNIVERSITY, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Margaret Hosty, Jeni Porche and Steven Barba, individually and doing business as Innovator (collectively "plaintiffs"), sue officers of Governors State University ("GSU") for prior restraint violations of the First Amendment (Count I), equitable relief (Count II) and punitive damages (Count III), pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2202. Defendants move for summary judgment.

BACKGROUND

I. The Facts

A. The Parties

All facts are undisputed unless otherwise noted. GSU is a state-run institution in University Park, Illinois. Plaintiffs are GSU students and former editors and writers of GSU's student newspaper, the Innovator. The Innovator is funded through student activities fees. Defendant Donald Bell is a GSU program director and was the administrative liaison to the Student Communications Media Board ("the media board"), which regulates and appropriates the Innovator's budget. Defendant Tommy Dascenzo was a GSU program director. Defendant Patricia Carter is Dean of Student Affairs. Defendant Stuart Fagan is President of GSU. Defendant Paul Keys is GSU's Provost and Vice President of Academic Affairs. Defendant Jane Wells is a GSU faculty member. Defendant Debra Conway is a GSU secretary. Defendant Peggy Woodard is the interim Associate Provost. Defendants Frances Bradley, Peter Gunther, Ed Kammer, Dorothy Ferguson, Claude Hill and Judy Young are members of the media board. Defendant Paul Schwellenbach supervises GSU's mailroom.

B. The Claims

Plaintiffs began working for the Innovator in May 2000. The newspaper has a faculty advisor that advises the editors and writers on issues of journalistic standards and ethics. But the student editors and writers are given complete editorial control over the newspaper, including its subject matter and content. The faculty advisor normally signs-off on the

newspaper before it is sent to the printer. GSU entered into a contract with Regional Publishing Company to print the Innovator on a bimonthly basis. However, the newspaper rarely printed that frequently during plaintiffs' tenure.

In May 2000, the Innovator's office equipment and computers were in disrepair. During the summer of 2000, the Innovator received new equipment, which included two digital scanners and three new computers. One of the newspaper's computers needed repairs but the media board would not authorize payment. Plaintiffs contend Donald Bell removed one of the Innovator's computers that contained the newspaper's files without their permission. Hosty dep. at p. 128; Porche dep. at pp. 146-47. Bell removed and replaced the computer because plaintiffs had complained the computer was non-functioning. Bell returned the computer after plaintiffs complained about its removal.

Plaintiffs contend they were denied access to computer software and manuals. Hosty dep. at pp. 133-35. Bell was the administrator responsible for computer software. Because software purchased by the media board had disappeared, Bell stored computer software in his office available upon request. Plaintiffs attest Bell was rarely in his office when they needed the software. Hosty aff. ¶ 24; Porche aff. ¶ 24. Plaintiffs also contend Bell, Dascenzo and the media board inhibited the newspaper's operations by replacing the newspaper's IBM computers with Macintosh ones. Hosty dep. at pp. 137-39. The media board replaced the IBM computers with Macintosh computers in order to conform to the media industry standard. Plaintiffs disagreed with the media board's assessment.

Prior to October 31, 2000, plaintiffs contend they were investigating a story regarding misappropriation of GSU

funds and illegal hiring practices. Hosty dep. at pp. 44-46. Plaintiffs contend their investigations were inhibited because the Innovator did not have a private facsimile machine or mailbox. Thus, they contend sources were reluctant to provide the newspaper with tips knowing their correspondence was not private. Hosty dep. at pp. 84-85. Plaintiffs also contend persons with keys to the Innovator's office, such as Bell and Dean Carter, could have seen the projected articles and tips on the newspaper's bulletin board. Hosty dep. at pp. 62-63.

In late October and early November of 2000, Dean Carter placed two phone calls to Charles Richards, Regional Publishing's owner and president, regarding the printing of the Innovator. Richards attests Dean Carter called on behalf of the GSU administration and ordered Regional Publishing not to print the Innovator without prior approval of the newspaper's content by a GSU administrator. Richards attests he informed Dean Carter that requiring prior approval was probably unconstitutional; Carter responded that Richards must call her personally before printing the next issue of the newspaper and reminded him that GSU paid Regional Publishing. Richards aff. ¶¶ 4-6, 8. Richards recorded the nature of his conversations with Dean Carter in a letter and sent a copy to plaintiffs. *Id.* at ¶ 10-11. Dean Carter denies she demanded prior approval and contends she instructed Richards to call her regarding the newspaper so that a faculty member could review the paper for journalistic quality, *e.g.*, grammatical mistakes. She contends this was necessary because the newspaper's faculty advisor was at a new post four hours from campus and was not readily available to assist the Innovator staff. Carter dep. at pp. 12-15.

After being informed of the conversations with Regional Publishing, President Fagan had Vice President Keys question Dean Carter about the phone calls and Richards' letter. Dean Carter informed Keys that Richards' characterization of the phone calls was inaccurate and that she did not instruct Regional Publishing to "halt the presses." Vice President Keys did not contact Richards or the plaintiffs about the phone calls. Vice President Keys believed Richards' letter was inaccurate and reported his conversations with Dean Carter to President Fagan. During this same time period, plaintiffs distributed a letter to the GSU community regarding Dean Carter's phone calls to Regional Publishing and reported the matter to the Illinois College Press Association.

Prior to Dean Carter's phone calls, the October 31, 2000 issue of the Innovator had already been printed and delivered. Plaintiffs continued to work on the newspaper after the October 31 issue, but contend they did not submit any further issues to Regional Publishing because of its hesitation to print the newspaper after Dean Carter's phone calls. Specifically, Regional Publishing did not want to risk printing the newspaper and not being paid by GSU. Beedie (Regional Publishing manager) aff. ¶¶ 4-5; Hosty dep. at pp. 22, 34-37; Porche dep. at pp. 33-34.

The media board approves the budget and expenditures for the Innovator and other student media. The November and December 2000 media board meetings were canceled. The November meeting was canceled so the new administrative liaison to the media board, Donald Bell, could familiarize himself with the issues pending before the media board. Bell was appointed administrative liaison one week before the scheduled November meeting. The December meeting was canceled due to the hospitalization of media board

chairman Ed Kammer. Plaintiffs contend the cancellations prevented them from publishing the newspaper because the media board controlled the essential funds. Hosty dep. at p. 16. Bell and media board members Bradley, Gunther, Kammer and Young all attest the cancellations were reasonable and did not inhibit the newspaper's progress because the Innovator's budget was already in place. Bell dep. at pp. 52-53, 112-13; Bradley aff. at ¶ 6; Gunther aff. ¶¶ 6-7; Kammer aff. ¶¶ 6-9; Young aff. ¶ 6. Moreover, in a letter announcing cancellation of the December meeting, Bell stated he would authorize printing of the newspaper if the editors had an issue ready for publication. Plaintiffs contend there was no point in printing a December edition of the newspaper because the students had left for winter break. Hosty dep. at pp. 113-14. Plaintiffs Hosty and Porche also attest the media board held a meeting regarding their tenure as editors in February 2001. They attest Bell placed a GSU policeman outside the meeting room to prevent them from entering. Porche aff. ¶ 20; Hosty aff. ¶ 20.

In the summer of 2000, plaintiffs reported break-ins to the Innovator's office to Bell, Dascenzo and the media board. Plaintiffs contend Bell informed them he would file reports with GSU police and have the Innovator's locks changed. Hosty dep. at pp. 116-17. Plaintiffs attest after Bell failed to act, they reported the break-ins to GSU police and their faculty advisor, who had the locks changed. *Id.*; Porche aff. ¶ 18; Hosty aff. ¶ 18. Bell and Dascenzo attest that when plaintiffs informed them of the break-ins, they advised plaintiffs to refer the matter to GSU police. Bell dep. at pp. 74-76; Dascenzo aff. ¶ 8. Bell and Dascenzo had keys to the newspaper's office, but they did not distribute the keys to any unauthorized individuals.

In October 2000, GSU police changed the newspaper's locks for a second time. As a result, plaintiffs were required to contact GSU police to gain access to the office for five weeks. Plaintiffs attest defendants Carter, Conway, Bell, Kammer and Wells knew the locks had been changed. Porche aff. ¶ 19, Hosty aff. ¶ 19. Plaintiffs contend the delay in gaining access to the newspaper's office disrupted the Innovator's press schedule. Porche aff. ¶ 21; Hosty aff. ¶ 21.

Plaintiffs claim the phone lines to the Innovator's office were disconnected for approximately two hours on October 25, 2000, but present no evidence of defendants' involvement. Porche dep. at p. 76. Plaintiffs also contend Innovator email messages were tampered with and deleted, but fail to present evidence of defendants' involvement. *Id.* at pp. 98-105. Plaintiffs claim Debra Conway destroyed Innovator advertisement forms and failed to process Innovator purchase orders. Porche dep. at pp. 121, 123, 126; Hosty dep. at p. 124. Conway denies ever destroying or failing to process Innovator materials. Conway aff. ¶¶ 12-20. Finally, plaintiffs contend Paul Schwellenbach tampered with Innovator mail. Hosty dep. at p. 128; Porche dep. at pp. 131, 136-37. Schwellenbach denies tampering with Innovator mail. He admits returning mail to Jeni Porche because he thought it was personal mail and GSU does not provide postage for private correspondence. Schwellenbach aff. ¶¶ 13-15.

DISCUSSION

I. Standard of Review

Summary judgment is appropriate when the moving papers and affidavits show there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *King v. Nat'l Human Res. Comm., Inc.*, 218 F.3d 719, 723 (7th Cir. 2000). Once a moving party has met its burden, the nonmoving party must go beyond the pleadings and set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir. 1999). The court considers the record as a whole and draws all reasonable inferences in the light most favorable to the party opposing the motion. *Bay v. Cassens Transp. Co.*, 212 F.3d 969, 972 (7th Cir. 2000). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Insolia v. Philip Morris, Inc.*, 216 F.3d 596, 599 (7th Cir. 2000).

II. Section 1983 Liability

In § 1983 actions, an individual cannot be held liable unless he caused or participated in the asserted constitutional violation. *Zimmerman v. Tribble*, 226 F.3d 568, 574 (7th Cir. 2000). Defendants argue that other than Dean Carter, plaintiffs fail to establish individual involvement on the part of each defendant, and therefore the § 1983 claims must fail.

Plaintiffs contend Bell violated their First Amendment rights by denying them access to essential computer software and manuals, temporarily removing an Innovator computer without permission, failing to investigate break-ins to the newspaper's office, and canceling the November and December media board meetings. Plaintiffs contend Tommy Dascenzo, Judy Young, Peter Gunther and Francis Bradley violated their First Amendment rights by replacing the IBM computers with Macintosh ones, failing to investigate break-

ins to the newspaper's office, and holding a private meeting regarding plaintiffs' status as editors. Plaintiffs claim Debra Conway violated their First Amendment rights by failing to process Innovator requests and destroying Innovator advertisement forms. Plaintiffs contend Paul Schwellenbach violated their First Amendment rights by tampering with Innovator mail. Thus, viewed in a light most favorable to plaintiffs, there is evidence that defendants Bell, Dascenzo, Conway, Bradley, Gunther, Young and Schwellenbach individually participated in the asserted First Amendment violations.

Plaintiffs contend President Fagan and Vice President Keys participated in the asserted constitutional violations by failing to adequately investigate Dean Carter's phone calls to Regional Publishing. However, the doctrine of *respondeat superior* cannot be used to hold a supervisor liable for the asserted unconstitutional acts of a subordinate. *Chavez v. Ill. State Police*, 251 F.3d 612, 651 (7th Cir. 2001); *Zimmerman*, 226 F.3d at 574. Plaintiffs must show Keys and Fagan were personally involved in unconstitutional conduct, or that they approved or facilitated the conduct. *Chavez*, 251 F.3d at 651. But plaintiffs do not claim Keys and Fagan did anything more than fail to properly investigate Dean Carter's phone calls. A supervisor's negligence in detecting unconstitutional conduct is insufficient to hold the supervisor liable. *Id.* Plaintiffs also fail to present any evidence that Jane Wells or Peggy Woodard participated in constitutional violations. Therefore, summary judgment must be granted for defendants Keys, Fagan, Wells and Woodard.

III. Qualified Immunity

Alternatively, defendants argue the doctrine of qualified immunity bars plaintiffs' claims because their conduct did

not violate clearly established constitutional rights. Under the doctrine, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Upton v. Thompson*, 930 F.2d 1209, 1211-12 (7th Cir. 1991) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Plaintiffs bear the burden of showing that defendants' conduct violated a clearly established constitutional right. "This requires the plaintiff[s] to offer either a closely analogous case or evidence that the defendants' conduct is patently violative of the constitutional right that reasonable officials would know without guidance from the courts." *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 737 (7th Cir. 1994).

Plaintiffs claim Dascenzo, Bradley, Gunther and Young violated their First Amendment rights by replacing the IBM computers with Macintosh ones, failing to investigate break-ins to the newspaper's office, and holding a private meeting regarding plaintiffs' status as editors. Plaintiffs claim the Macintosh computers were not suitable for preparing a newspaper and therefore hindered their ability to publish the Innovator. They also claim the break-ins to the newspaper's office delayed publication of the Innovator and therefore inhibited their First Amendment right of expression. Plaintiffs do not present any case law that establishes a right to a certain type of computer or creates an affirmative duty on university officials to investigate crimes. Nor was the conduct of Dascenzo, Bradley, Gunther and Young patently violative of a constitutional right. Therefore, Dascenzo, Bradley, Gunther and Young are entitled to qualified immunity.

Plaintiffs claim Debra Conway violated their First Amendment rights by refusing to process Innovator materials and by destroying Innovator advertisement forms. Plaintiffs fail to present evidence that Conway's asserted actions were an attempt to frustrate their freedom of speech. Nor do they cite case law to support their claim. Because Conway's asserted conduct did not violate clearly established rights, she is entitled to qualified immunity.

Paul Schwellenbach is accused of destroying Innovator mail. Schwellenbach admits he returned mail to plaintiffs when the mail appeared to be personal and did not have proper postage. Plaintiffs present no evidence Schwellenbach's conduct was an attempt to frustrate their freedom of speech. Nor do plaintiffs cite authority to support their claim. Thus, Schwellenbach is entitled to qualified immunity.

Plaintiffs contend Bell inhibited their freedom of speech by canceling media board meetings that were necessary to obtain funds. The only case plaintiffs cite to support their claim against Bell is *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973). In *Joyner*, a university president terminated the school newspaper's financial support because he disapproved of its editorial comment. The court held a college may not restrict speech "simply because it finds the views expressed by any group to be abhorrent." *Id.* at 460. Thus, the court found the president's withdrawal of financial support to be an unconstitutional prior restraint. *Id.* at 462.

Plaintiffs claim cancellation of media board meetings was the equivalent of withholding financial support. But *Joyner* is distinguishable because *Joyner* held it is unconstitutional for a college official to suppress speech *because he disagrees with the students' expression. Id.* at 460. Here, it is

undisputed the November and December meetings were canceled for legitimate reasons. Specifically, the November meeting was cancelled in order to allow Bell time to review the issues before the media board. Bell was appointed administrative liaison to the media board only one week prior to the November meeting. The December meeting was cancelled due to the hospitalization of media board chairman Ed Kammer. Thus, unlike the president in *Joyner*, Bell did not cancel the meetings in order to suppress plaintiffs' expression. Furthermore, Bell explicitly told plaintiffs in his December letter he would approve funding for the newspaper if they had an issue ready to be published. Therefore, plaintiffs fail to establish Bell violated a clearly established constitutional right by canceling the meetings.

Plaintiffs also claim Bell violated their First Amendment rights by replacing an Innovator computer containing confidential files without permission, denying them access to computer software, and failing to investigate break-ins to the newspaper's office. Plaintiffs fail to present evidence that Bell's actions were intended to inhibit their freedom of speech. Rather, it is undisputed Bell stored the computer software in his office for security reasons and removed and replaced the computer from the newspaper's office after plaintiffs complained it was non-functioning. After plaintiffs complained about the computer's removal, Bell returned it to their office. Plaintiffs also fail to establish Bell had a duty to investigate the break-ins or was responsible for them. Nor do plaintiffs cite any cases supporting their claims. Thus, Bell is entitled to qualified immunity.

Finally, plaintiffs claim Dean Carter's phone calls to Regional Publishing amounted to an unconstitutional prior restraint. Specifically, plaintiffs claim they were unable to publish the Innovator after Dean Carter's phone calls because

of her threats to withhold payment to Regional Publishing. Plaintiffs cite *Fujishima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1992), *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970), and *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975), to support their claim.

In *Fujishima*, the Seventh Circuit struck down as a prior restraint a school board rule prohibiting student distribution of literature on school grounds without obtaining prior approval. 460 F.2d at 1357. In *Antonelli*, a university official refused to authorize the printing of future editions of the university newspaper unless an administrator first approved the newspaper's content. The *Antonelli* court opined that "[b]ecause of the potentially great social value of a free student voice . . . it would be inconsistent with basic assumptions of First Amendment freedoms to permit a campus newspaper to be simply a vehicle for ideas the state or the college administration deems appropriate." *Id.* at 1337. The fact the university funded and created the newspaper was immaterial and the court held the policy was an unconstitutional prior restraint. *Id.* at 1337-38. *See also Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983) (it is unconstitutional for a public university to take adverse action against a student newspaper because of the content of the paper); *Joyner*, 477 F.2d at 460 (4th Cir. 1973) ("if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment").

In *Schiff*, the president of a state university dismissed the editors of the campus newspaper because the editors' poor grammar, spelling and language expression could have embarrassed the school. 519 F.2d at 257, 261. *Schiff* held the "right of free speech embodied in the publication of a college student newspaper cannot be controlled except under special circumstances." *Id.* at 260. The court opined poor

grammar and language expression did not amount to "special circumstances" because these faults could not lead to a significant disruption on the university campus. Thus, the president's actions were unconstitutional. *Id.* at 261. Dean Carter was not constitutionally permitted to take adverse action against the newspaper because of its content or because of poor grammar or spelling. Accordingly, there is a disputed issue of material fact as to whether Dean Carter's asserted conduct violated plaintiffs' clearly established First Amendment rights.

Defendants argue *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1988), cast doubt on the cases cited by plaintiffs. The court disagrees. *Hazelwood* involved a high school newspaper that was part of a journalism class. There, the Court held no constitutional violation occurred when a high school principal removed two articles from the school newspaper. Central to the Court's holding was the fact the school never opened the pages of the paper to "indiscriminate use" by student editors, but rather maintained the paper as a supervised learning experience. *Id.* at 267, 270. Here, however, all editorial decisions were made by student editors and the Innovator was not part of a class, but was an autonomous student organization. The *Hazelwood* decision is also distinguishable because it involved a high school as opposed to a university. *Id.* at 273 n.7 ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level"). Therefore, Dean Carter is not entitled to qualified immunity.

CONCLUSION

The motion for summary judgment is granted as to all defendants except Patricia Carter.

November 13, 2001

/s/
Suzanne B. Conlon
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARGARET HOSTY, et al.,	
Plaintiffs,	
v.	No. 01 C 0500
	Suzanne B. Conlon, Judge
GOVERNORS STATE UNIVERSITY, et al.,	
Defendants.	

MEMORANDUM OPINION AND ORDER

Margaret Hosty, Jeni Porche, Steven P. Baron, individually and doing business as Innovator (collectively "plaintiffs") sue Governors State University ("Governors State"), the Board of Trustees of Governors State ("the board"), Donald Bell, Tommy Dascenzo, Patricia Carter, Stuart Fagan, Paul Keys, Jane Wells, Debra Conway, Peggy Woodard, Frances Bradley, Peter Gunther, Ed Kammer, Dorothy Ferguson, Judy Young, Claude Hill IV, and Paul Schwellenbach (collectively "defendants") for prior restraint violations of the First Amendment (Count I), equitable relief (Count II), and punitive damages (Counts III), pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2202. Defendants move to dismiss for lack of jurisdiction and failure to state a claim.

BACKGROUND

For purposes of a motion to dismiss, the court accepts all well-pleaded allegations in the complaint as true and draws all reasonable inferences in favor of the plaintiff. Stachon v. United Consumers Club, Inc., 229 F.3d 673, 675 (7th Cir. 2000). Hosty, Porche, and Baron are students at Governors State and the editors and writers of a student-run newspaper, Innovator. Innovator is funded through student activity fees and is dedicated to distributing information and ideas pertinent to student life. Governors State is an Illinois university chartered by the general assembly, governed by the state, and supported primarily through government funds. The board, appointed by the governor, manages the university. Keys is provost, Wells and Woodard are associate provosts, Fagan is president, and Conway is secretary. Carter is dean of student affairs and Dascenzo is director of student life. Bradley, Gunther, Kammer, Ferguson, Young, and Hill are members of the communications board that regulates and appropriates Innovator's budget. Bell is administrative liaison between the university and Innovator. Schwellenbach supervises the university's mail room.

Defendants and their agents, acting under color of state law and outside the scope of authority, allegedly engaged in a campaign of prior restraints designed to frustrate plaintiffs' rights of freedom of speech and press. This purported campaign includes halting publication of Innovator, prohibiting future publication without approval of university administrators, and suspending Innovator's budget. Compl. at ¶¶ 24a-b. Further, defendants continue to provide unauthorized access to Innovator's office, and fail to investigate four office break-ins that resulted in criminal property damage. Id. at ¶¶ 24d-e. Defendants have allegedly

stolen, edited and deleted press mail and e-mail, and have interfered with plaintiffs' use of computer and communication systems. Id. at ¶¶ 24c,f,g,i,l-m. Defendants have destroyed materials essential to Innovator's operation, and have removed newspaper files. Id. at ¶¶ 24h,j. Finally, defendants have denied plaintiffs admittance to Innovator's office for more than a month. Id. at ¶ 24k.

DISCUSSION

I. Motion to dismiss standard

In ruling on a motion to dismiss, the court considers "whether relief is possible under any set of facts that could be established consistent with the allegations." Pokuta v. Trans World Airlines, Inc., 191 F.3d 834, 839 (7th Cir. 1999). Only if no set of facts would entitle the plaintiff to relief based on the complaint's allegations will a motion to dismiss be granted. Vonderohe v. B & S of Fort Wayne, Inc., 36 F. Supp.2d 1079, 1081 (7th Cir. 1999). The sufficiency of the complaint is tested by a motion to dismiss, not its merits. Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990).

II. Jurisdiction and the Eleventh Amendment

A. Governors State University and its Board of Trustees

Defendants argue that plaintiffs' § 1983 claims against Governors State and the board are barred by the Eleventh Amendment. Eleventh Amendment issues arise whenever a private party files a federal lawsuit against a state, a state agency or a state official. Pennhurst v. State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100-02 (1984); Gossmeyer v.

McDonald, 128 F.3d 481, 487 (7th Cir. 1997). This bar applies to any claim for which the state has not consented to be sued. Pennhurst, 465 U.S. at 100-01. Governors State and the board are arms of the state and may not be sued under § 1983. Kaimowitz v. Board of Tr. of Univ. of Ill., 951 F.2d 765, 767 (7th Cir. 1992); Raynard v. Board of Regents, 708 F.2d 1235, 1238-39 (7th Cir. 1983). Accordingly, plaintiffs' claims against Governors State and the board must be dismissed regardless of the nature of the relief sought.

B. Individual defendants sued in their official capacity

For purposes of the Eleventh Amendment, state representatives sued in their official capacity are considered the state, and this court is without jurisdiction to hear claims against them. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989). It is assumed that a public official is sued in an official capacity where the conduct underlying the § 1983 claim concerns actions taken under color of state law. Kolar v. County of Sangamon of the State of Ill., 756 F.2d 564, 568 (7th Cir. 1985). The allegations against the university officials arise out of their official duties, and they are immune from suit for retrospective relief under § 1983. Will, 491 U.S. at 64; Edelman v. Jordan, 415 U.S. 651, *reh'g denied*, 416 U.S. 1000 (1974); Kaimowitz, 951 F.2d at 767-68. Compensatory and punitive damages constitute retrospective relief and are barred. Quern v. Jordan, 440 U.S. 332 (1979). Thus, the claims for damages in Count I and III against the university officials in their official capacities are dismissed.

A federal court's remedial power, consistent with the Eleventh Amendment, allows the remedy of prospective declaratory and injunctive relief. Ex Parte Young, 209 U.S.

123 (1908). The motion to dismiss Count II as to the individual defendants in their official capacity is denied.

C. Individual defendants sued in their personal capacity and qualified immunity

Personal capacity suits raise no Eleventh Amendment concerns, even though an official might have the requisite nexus to the state for his actions to constitute state action. Kentucky v. Graham, 473 U.S. 159, 165-67 (1985). Thus, an action for compensatory and punitive damages is permissible. Defendants argue that plaintiffs sue the university officials only in their official capacity. But plaintiffs aver the university officials acted purposefully outside of the scope of their authority. Compl. at ¶ 24. This is sufficient to allege personal capacity claims against them. *See* Richman v. Sheahan, No. 98 C 7350, 2000 WL 343349, at *5 (N.D. Ill. Mar. 31, 2000); Benning v. Board of Regents of Regency Univ., No. 89 C 20072, 1990 WL 32305, at *3 (N.D. Ill. Feb. 12, 1990).

Alternatively, defendants argue qualified immunity prevents recovery of damages against them. Qualified immunity protects public officials from monetary liability when their conduct does not violate clearly established rights. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Kitzman-Kelley v. Warner, 203 F.3d 454, 457 (7th Cir. 2000). To determine whether an official's conduct violates clearly established law requires a two-step inquiry. First, plaintiffs must show that the law was clearly established when the challenged conduct occurred. The question is "whether the law was clear in relation to the specific facts confronting the public official when he or she acted." Apostol v. Landau, 957 F.2d 339, 341 (7th Cir. 1992). Second, the objective legal reasonableness of defendants' conduct is evaluated by

asking whether reasonably competent officials would agree on the application of the clearly established right to a given set of facts. Id. at 341. *See also* Henderson v. DeRobertis, 940 F.2d 1055, 1059 (7th Cir. 1991), *cert. denied*, 503 U.S. 966 (1992).

Plaintiffs argue that since Tinker v. Des Moines Ind. Cmty. Sch. Dist., 393 U.S. 503 (1969) was decided, public school students have been entitled to freedom of expression protections guaranteed by the First Amendment, and that the United States Supreme Court extended these protections to student publications. Because of the long-standing precedent supporting freedom of speech and press at state universities, plaintiffs argue defendants could not have been unaware that their actions clearly violated plaintiffs' First Amendment rights. Defendants are immune from suit only if they were not on notice that their behavior was "probably unlawful." Montville v. Lewis, 87 F.3d 900, 902-03 (7th Cir. 1996). Efforts to frustrate students' freedom of speech has been a clear violation of law for well over a quarter of a century. The alleged closing of Innovator and other conduct designed to assert control over its publication; meddling with plaintiffs' communications; and denying plaintiffs access to Innovator for more than a month are all actions that would clearly violate plaintiffs' freedom of speech. Further, defendants admit that editorial control over Innovator would be a clear violation of law, but assert plaintiffs failed to allege conduct amounting to editorial control. However, viewed in a light most favorable to plaintiffs, defendants' conduct constitutes editorial control, and clearly violates established First Amendment law. Defendants are not entitled to qualified immunity.

III. Count I

First Amendment freedom of speech and freedom of press are protected from intrusion by state action by the Fourteenth Amendment. Lovell v. City of Griffin, 303 U.S. 444, 450 (1938). Defendants argue that plaintiffs fail to allege personal involvement on the part of the university officials, and therefore the § 1983 claims must be dismissed. To be liable under § 1983, a defendant must be personally involved in the alleged constitutional deprivation. Zimmerman v. Tribble, 226 F.3d 568, 574 (7th Cir. 2000); Starzenski v. City of Elkhart, 87 F.3d 872, 879 (7th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997). However, plaintiffs allege that *all* defendants (including Governors State officials) are guilty of conduct that violates the First Amendment. Viewed in a light most favorable to plaintiffs, the complaint states a First Amendment claim against the university officials.

A. Freedom of speech

A key inquiry regarding plaintiffs' First Amendment claims is the type of forum Innovator involves. The forum dictates the extent and circumstances under which the government may intrude into the First Amendment rights of students. A public forum "by long tradition or by government fiat [is] . . . devoted to assembly and debate." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). In a public forum, the state's right to limit expression is sharply circumscribed; restrictions may be enforced only if narrowly drawn to serve a compelling interest. Id. Similarly, time, place, and manner regulations are permitted only if narrowly tailored to serve an important government interest and leave ample alternative channels of communication. Id.

Defendants concede that Innovator serves as a public forum. Therefore, defendants face a heavy burden to justify the restrictions imposed on Innovator, including the arbitrary closing of this forum to plaintiffs until they submit to university screening of each issue's content; tampering with written communications regarding Innovator; and denying plaintiffs entry to Innovator's office. Defendants offer no governmental interest as a reason for their actions. Plaintiffs state a First Amendment claim for freedom of speech. Without any legal support, defendants argue only conduct motivated by attempts "to assert editorial control over the content of a university newspaper" violate the First Amendment, and that plaintiffs have not alleged such conduct. Def. Br. at 4-5. Editorial control is not required for a First Amendment claim; stifling freedom of speech in a forum opened for discussion is sufficient. Perry, 460 U.S. at 45-46; Tinker, 393 U.S. at 509-514. Moreover, plaintiffs have alleged editorial interference.

B. Freedom of press

As a state university newspaper, Innovator is entitled to constitutional protections afforded the press. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974); Papish v. Board of Curators of Univ. of Mo., 410 U.S. 667 (1973); Healy v. James, 408 U.S. 169 (1972). This includes editorial discretion regarding style and content. Miami Herald Publ'g Co., 418 U.S. at 258. State intrusion into this process violates the First Amendment freedom of press. Id. at 256. Innovator's expression is not unrestricted. Its freedom is tempered by the need to maintain order and discipline within the educational process. Tinker, 393 U.S. at 509, 511, 513; Bazaar v. Fortune, 476 F.2d 570, 575 (5th Cir. 1973). It is defendants' burden to make this showing. Tinker, 393 U.S. at 509.

Under liberal pleading standards, plaintiffs state a First Amendment claim. Plaintiffs allege defendants stopped publication of Innovator and, without justification, refused to publish more issues without the approval of Governors State administrators. Absent a constitutionally viable reason for their actions, defendants' alleged imposition would violate the First Amendment. *See* Fujishima v. Board of Educ., 460 F.2d 1355, 1357-58 (7th Cir. 1972); Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970); ACLU of Va. v. Radford Coll., 315 F. Supp. 893, 896-97 (W.D. Va. 1970). Plaintiffs also allege defendants impeded their freedom of press rights by suspending Innovator's budget without explanation. This too violates freedom of press rights. Stanley v. Magrath, 719 F.2d 279 (8th Cir. 1983); Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973); Korn v. Elkins, 317 F. Supp. 138 (D. Md. 1970).

Additionally, plaintiffs allege numerous other instances where defendants inhibited Innovator's continued operation, including destruction of materials and refusal to perform functions necessary for publication. These actions would violate the First Amendment. Bigelow v. Virginia, 421 U.S. 809, 829 (1975).

IV. Counts II and III

Defendants argue that by incorporating the allegations of Count I, Counts II and III are merely duplicative and should be dismissed. A reading of the first amended complaint shows this argument is frivolous. The relief sought in Count II is equitable, while Count III seeks punitive damages. These remedies are substantively different than the compensatory damages sought in Count I. To the extent plaintiffs also request injunctive relief in Count I, that prayer for relief is stricken.

CONCLUSION

The motion to dismiss is granted as to Governors State University and its Board of Trustees on all claims, and to the individual defendants in their official capacity in Counts I and III. The motion is denied as to the individual defendants in their personal capacity on all claims and in their official capacity on Count II. The claim for injunctive relief in Count I is stricken.

April 27, 2001

/s/
Suzanne B. Conlon
United States District Judge

UNITED STATES COURT of APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 25, 2003

BY THE COURT:

No. 01-4155

MARGARET HOSTY, JENI PORCHE, and STEVEN P. BARBA, individually and d/b/a INNOVATOR,
Plaintiffs-Appellees,

v.

PATRICIA CARTER,
Defendant-Appellant,

and

GOVERNORS STATE UNIVERSITY, et al.,
Defendants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 01 C 0500

Suzanne B. Conlon,
Judge.

ORDER

A majority of judges in active status have voted to grant the petition for rehearing en banc in this case. Accordingly, the April 10, 2003, panel decision is VACATED. A date for oral argument before the full court will be set in the near future.

CONSTITUTIONAL PROVISIONS INVOLVED:

First Amendment, United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, United States Constitution

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the member of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the

whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATUTORY PROVISION INVOLVED:

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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No. 05-377

In the Supreme Court of the United States

MARGARET L. HOSTY, JENI S. PORCHE, AND STEVEN P. BARBA,
PETITIONERS,

v.

PATRICIA CARTER, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.7 (1988), this Court declined to decide if post-secondary public school officials may reasonably regulate the content and style of school-sponsored speech for legitimate pedagogical purposes in a non-public forum. Petitioners, who were editors and a staff reporter of *Innovator, The Newspaper of Governors State University* (GSU), filed this suit against respondent Dean Patricia Carter (among others), alleging that she violated their First and Fourteenth Amendment rights by requiring pre-publication review of the paper. Sitting *en banc*, the Seventh Circuit agreed with petitioners that a reasonable jury could find that *Innovator* was not a non-public forum and thus was not subject to editorial control by GSU administrators. The court granted summary judgment for Dean Carter on qualified immunity grounds, however, holding that not all reasonable university officials in her shoes had to know that *Innovator* was not a non-public forum because "factual and legal uncertainties dog the litigation."

The question presented is whether the Seventh Circuit erred in holding that Dean Carter was entitled to qualified immunity, given the "cloudy" facts in the record on summary judgment and petitioners' concession that judges disagree even today about if and how *Hazelwood* applies to post-secondary schools.

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BRIEF IN OPPOSITION

STATEMENT

A. From May 2000 through April 2001, petitioners Jeni Porche and Margaret Hosty were the Editor-in-Chief and Managing Editor, respectively, of *Innovator, The Newspaper of Governors State University* (GSU); petitioner Steven Barba was a staff reporter. Docs. 36, 43 at ¶¶ 17-20. Contrary to petitioners' repeated characterization of the paper as operating "outside of" or "separate and apart from" GSU's curriculum (*see, e.g.*, Pet. i, 20, 25 n.10, 26), class credit (or work-study status or a stipend) could be requested as compensation for working on the paper (Doc. 44 at Hosty dep. at 11-12). The parties agree that petitioners Porche and Hosty each received a $4,500 stipend for the year. Docs. 36, 43 at ¶ 33; Doc. 44 at Hosty dep. at 14.

GSU's Student Communications and Media Board (the SCMB) published *Innovator*, which was funded by student activities fees. Pet. App. 11a. According to its charter, the SCMB was "responsible to the Director of Student Life," who in turn was a subordinate of respondent Patricia Carter, GSU's Dean of Student Affairs and Services. Pet. App. 11a-12a. GSU's media policy states that the student staff determines the content and format of each publication without censorship or advance approval. Pet. App. 11a.

Like other SCMB media, *Innovator* had a faculty advisor. Pet. App. 12a. The parties agree that the "normal procedure" was to have the faculty advisor sign off on the paper before it went to the printer. Docs. 36, 43 at ¶ 46. They also agree that after August 2000, *Innovator*'s advisor (Geoffrey de Laforcade) was no longer a GSU faculty member and instead was employed at a college in Carlinville, Illinois. Docs. 36, 43 at ¶ 44.

B. The October 31, 2000 issue of *Innovator* contained several articles by petitioner Hosty. Doc. 44 at Fagan dep. at exhibit. One criticized the coordinator of GSU's English department, another criticized GSU's Dean of the College of Arts and Sciences concerning the decision not to renew de Laforcade's employment contract, and a third reported on a GSU student senate meeting at which the senate president had criticized GSU President Stuart Fagan. *Id.* Another student wrote a column criticizing GSU's financial aid office (*id.*), which was under Dean Carter's aegis (Doc. 44 at Carter dep. at 25).

On or around October 31, 2000, Dean Carter called the printer and instructed him not to print any more issues of *Innovator* without first calling her so that she or someone from the administration could read and approve it. Pet. App. 2a. She called again later and made the same request. Doc. 44 at Richards affidavit.

On November 3, 2000, GSU President Fagan distributed to the GSU community a memorandum he wrote to petitioner Porche, criticizing the October 31, 2000 issu as "an angry barrage of unsubstantiated allegations that essentially – and unfairly – excoriated some members of the university faculty and administration (myself included)." Doc. 44 at Fagan dep. at exh. 2. On November 16, 2000, petitioner Porche responded in an open letter to the GSU community on *Innovator*'s letterhead.[1] Doc. 43 at exh. B.

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[1] When the Illinois College Press Association (ICPA) investigated Porche and Hosty's censorship claims, it concluded that they and de Laforcade had committed "several ethical lapses": (1) Porche and Hosty reported on the student senate even though they were senate members; (2) they printed de Laforcade's letter to the editor criticizing the administration

Petitioner Porche decided not to submit another issue of *Innovator* for publication; she felt that the "chief deterrent" to publishing subsequent issues was the SCMB, which controlled the paper's funds. Doc. 44 at Porche dep. at 36, 60; *see also* Pet. App. 39a. She and petitioner Hosty continued to work on articles for the paper, and they continued to be paid their stipends. Docs. 36, 43 at ¶¶ 28-29, 33.

C. In January 2001, petitioners sued Dean Carter as well as GSU itself, GSU's Board of Trustees, and several other GSU administrators, faculty members, and students, alleging violation of their First and Fourteenth Amendment rights. Pet. App. 35a. After dismissing GSU and its Board of Trustees on sovereign immunity grounds (Pet. App. 52a), the district court found that all remaining defendants except Dean Carter were entitled to summary judgment on the merits or on qualified immunity grounds (Pet. App. 34a-48a). Citing pre-*Hazelwood* cases holding that to require pre-publication review of a paper created and funded by a public university was unconstitutional, petitioners argued that Dean Carter's calls to the printer violated clearly established First Amendment law. Pet. App. 46a-47a.

In a single paragraph, the district court found that Dean Carter was not entitled to qualified immunity. Pet. App. 47a. It disagreed with her argument that *Hazelwood* cast doubt on

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about a faculty member's employment situation; (3) they wrote stories about the English Department coordinator, who was also one of their teachers, which appeared to be a conflict of interest; and (4) the paper blurred the line between news and commentary, particularly in its coverage of the student senate. Doc. 43 at exh. C. ICPA also believed that GSU administrators, including Dean Carter, had acted inappropriately. *Id.*

petitioners' pre-*Hazelwood* authorities because (1) *Hazelwood* concerned a "supervised learning experience," whereas *Innovator* was an "autonomous student organization"; and (2) *Hazelwood* applied only to high schools, relying on *Hazelwood*'s footnote declining to decide the degree of deference to be accorded to school-sponsored speech in post-secondary schools. *Id.* (citing 484 U.S. at 273 n.7).

Dean Carter appealed this interlocutory order, and a three-judge panel of the Seventh Circuit affirmed (Pet. App. 25a-33a), but the full court vacated that opinion (Pet. App. 59a).

D. After rehearing *en banc*, the Seventh Circuit reversed on the second step of the qualified immunity analysis in *Saucier v. Katz*, 533 U.S. 194 (2001). Pet. App. 1a-15a. On the merits, the court agreed with petitioners that a reasonable jury could conclude that *Innovator* was not a non-public forum and thus was beyond the control of GSU administrators. Pet. App. 10a-12a. It held, however, that Dean Carter was entitled to summary judgment on qualified immunity grounds because "both legal and factual uncertainties dog the litigation." Pet. App. 10a-15a.

Before addressing the merits, the court briefly reviewed *Hazelwood*, which concerned a newspaper produced by a high school journalism class and financed with public funds. Pet. App. 4a. The court noted that the *Hazelwood* court began by first applying public forum analysis and determining that the paper was a non-public forum due to the school's policy and practice of supervising the writing and reviewing the content of each issue. *Id.* (citing 484 U.S. at 267-70). The court observed that *Hazelwood* distinguished the newspaper articles from the students' independent speech in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), on the ground that the school in *Hazelwood* subsidized the paper's costs. Pet. App. 4a. The court reasoned that under *Hazelwood*, school-funded

speech may be regulated when "reasonably related to legitimate pedagogical concerns," which permits setting standards for speech disseminated under its auspices that are even higher than "real world" standards. Pet. App. 5a (citing 484 U.S. at 271-72). The court added that in a footnote, *Hazelwood* explicitly declined to decide if the "substantial deference" lower federal courts had accorded educators' decisions about the content of school-sponsored expressive activities was appropriate at the post-secondary school level. Pet. App. 5a (citing 484 U.S. at 273-74 n.7).

Next, the Seventh Circuit rejected petitioners' (and the district court's) reading of the *Hazelwood* footnote to mean that high school newspapers are reviewable but college newspapers are not. Pet. App. 5a. It stressed that the footnote addressed only degrees of deference, adding that "[w]hether *some* review is possible depends on the answer to the public-forum question, which does not (automatically) vary with the speakers' age." Pet. App. 5a (emphasis in original). The court agreed with petitioners that age comes into play when courts assess the reasonableness of an asserted pedagogical justification in a non-public forum, *e.g.*, when the justification is audience maturity. Pet. App. 6a. By contrast, the court suggested, when the justification depended on a desire to ensure high standards (for, *e.g.*, grammar, style, research, or lack of bias) for speech disseminated in non-public forums and under the school's auspices, there would be "no sharp difference between high school and college papers." *Id.* Noting that even adult speech may be reasonably regulated in non-public forums when government-funded, while in designated public forums, viewpoint-based restrictions on private speech are forbidden even in elementary schools, the court concluded that "age does not control the public-forum question." *Id.* at 6a-7a (citing *Rust v. Sullivan*, 500 U.S. 173 (1991), and *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998)).

The Seventh Circuit then rejected petitioners' (and the district court's) view that *Hazelwood* had deemed the paper there a non-public forum based solely on its curricular status. Pet. App. 8a-9a. As support, it offered examples of school-sponsored extracurricular speech in which "the right to control would be evident," *e.g.*, a student's article in the alumni magazine for which college credit or payment is given. Pet. App. 9a. The court reasoned that "being part of the curriculum may be a *sufficient* condition of a non-public forum, [but] it is not a *necessary* condition. Extracurricular activities may be outside any public forum . . without also falling outside all university governance." *Id.* (emphases in original). The court reasoned that the public-forum analysis used in *Hazelwood* applies to all school-subsidized newspapers, later adding that *Hazelwood*'s framework "depends in large measure on the operation of public-forum analysis rather than the distinction between curricular and extracurricular activities." Pet. App. 7a, 13a.

Turning its attention to the merits of petitioners' claims, the Seventh Circuit first asked if *Innovator* was a non-public forum, for only then would it matter if Dean Carter's calls to the printer were justified by legitimate pedagogical concerns. Pet. App. 10a. The court then agreed with petitioners that a reasonable trier of fact could conclude from the record that *Innovator* was a designated public forum, which put the paper beyond the control of GSU administrators. *Id.* The court, however, "d[id] not think it possible on this record to determine what kind of forum the University established or [to] evaluate Dean Carter's justifications." *Id.* In particular, the court noted, the SCMB's rules were ambiguous, its charter provided that it was responsible to Director of Student Life, who appeared to be a subordinate of Dean Carter, and the parties disagreed about the identity of the advisor and the extent of his control. Pet App. 11a-12a.

Addressing the second step in the qualified immunity analysis, the Seventh Circuit pointed out that the district court itself had reached the wrong conclusions about if and how *Hazelwood* applied to colleges generally and to extracurricular speech in particular. Pet. App. 13a. Even if the constitutional framework did differ for high school and colleges, the court held, "it greatly overstates the certainty of the law to say that any reasonable college administrator had to know that rule." *Id.* As support, the court cited (among other authorities) the *Hazelwood* footnote, noting that the First Circuit had misconstrued this footnote as a holding that the deference accorded to high school educators did not apply at the college level. *Id.* (citing *Student Gov't Ass'n v. Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989)). Emphasizing that the Seventh Circuit itself had not spoken on the issue, the court described other circuits' approach as "hard to classify" and added that "[m]any aspects of the law with respect to students' speech . . . are difficult to understand and apply . . . ." Pet. App. 13a-14a (citing *Kincaid v. Gibson*, 236 F.3d 342, 346 n.5 (6th Cir. 2001) (*en banc*), and *Brown v. Li*, 308 F.3d 939 (9th Cir. 2003)). Under these circumstances, the court held, Dean Carter was entitled to qualified immunity because "the implementation of *Hazelwood* means that both legal and factual uncertainties dog the litigation." Pet. App. 14a. These uncertainties, the court reasoned, "make it inappropriate to say that any reasonable person in Dean Carter's position in November 2000 had to know that the demand for review before the University would pay the *Innovator*'s printing bills violated the first amendment." Pet. App. 14a-15a.

The three members of the original panel (joined by a fourth judge) dissented. Pet. App. 15a-24a. They quarreled with the majority's view that *Hazelwood*'s deferential standard would apply to a non-public forum at the college level, on the ground that "[a]ge . . . has always defined legal rights" and the schools' missions are different. Pet. App. 15a-21a. The dissent also